

No. 21-1087
(No. 21A376)

In The
Supreme Court of the United States

JOHN H. MERRILL,
IN HIS OFFICIAL CAPACITY AS THE
ALABAMA SECRETARY OF STATE, et al.,
Applicants,

v.

MARCUS CASTER, et al.,
Respondents.

**APPENDIX TO
EMERGENCY APPLICATION FOR STAY:
VOLUME 2 OF 2**

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BOBBY SINGLETON, et al., *
Plaintiffs, *
vs. * 2:21-cv-1291-AMM
JOHN MERRILL, in his *
official capacity as Alabama *
Secretary of State, et al., *
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EVAN MILLIGAN, et al., *
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TRANSCRIPT OF PRELIMINARY INJUNCTION
HEARING VIA ZOOM CONFERENCE
VOLUME I
BEFORE THE HONORABLE ANNA M. MANASCO,
THE HONORABLE TERRY F. MOORER,
THE HONORABLE STANLEY MARCUS

Proceedings recorded by
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to 28 U.S.C. 753(a) & Guide to Judiciary Policies and
Procedures Vol. VI, Chapter III, D.2. Transcript
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* * *

[110] any part black in District 7.

So if we will zoom in briefly into Jefferson County, based on your opinions about the 2021 map that was enacted, does it appear that this map –

MR. ROSS: Your Honor?

JUDGE MARCUS: Yes, Mr. Ross?

MR. ROSS: Outside the scope of her opinions in the state of her earlier testimony on direct.

JUDGE MARCUS: Mr. LaCour?

MR. LACOUR: Your Honor, we think this is quite important to see if her views are consistent and tell whether she views the enacted map to be a racial gerrymander because it does not elect more than one Democrat or if she would have similar views about any map that splits counties in similar ways.

JUDGE MARCUS: I didn't mean to cut you off, Mr. LaCour.

MR. LACOUR: I think it goes to credibility and also the constitutionality of the map that we have enacted.

JUDGE MARCUS: The objection is overruled. You may proceed with your question.

MR. LACOUR: Thank you.

JUDGE MARCUS: State it again just so the record is clear. I think it fairly goes to test this witness's expertise in the field that she's testifying about. You may proceed, but [111] if you would put the question again clearly to Dr. Davis again.

MR. LACOUR: Yes, Your Honor.

BY MR. LACOUR:

Q So, Dr. Davis, let's start with District 7. In particular, where District 7 enters Jefferson County, does this bear some resemblance to enacted District 7 in your view?

A Does this what?

Q Would this version of District 7 bear some resemblance to the enacted version of District 7?

A Yes. Yes.

Q And does it also appear to include a large percentage of Jefferson County's black population within District 7 and leave other members – other black

Alabamians in Jefferson County in District 6 in a similar way that you have identified for the enacted version?

A Yes.

Q Of District 7?

A Yes.

Q Okay. And then I want to scroll down a little to another county split. Looking here at District 2. You see it ventures down into Mobile County and appears to pick up a good portion of the city of Mobile.

In your view, would that be suggestive of racial gerrymandering?

A I'd have to see the stats for this District 2. But, [112] again, going back to Jefferson County, it pretty much does the same thing and also takes part of Tuscaloosa County, which is black, the city, and I mean, it does the very same thing that the enacted plan does.

And going to Montgomery County, where under the whole county plan, Montgomery stays intact. It – again, it's an effort to pull and concentrate black voters in the Second and then in the Seventh. It's an outcome-based plan. There's no question. And I am not as both my experience and my research tell me is not the best idea. I don't – I am not interested in outcomes. I'm interested in process.

Q Okay. Then I will quickly run through a couple other plans with similar questions. Stop sharing this for the moment.

And let me find this other exhibit. Next we have Caster Exhibit 23. This is a different plan also submitted by the Caster plaintiffs.

Similar question: It looks somewhat similar to the illustrative plan 1 that you were just talking about, correct?

A Exactly.

MR. ROSS: Your Honor, if I – I realize.

JUDGE MARCUS: I'm sorry. I'm trouble hearing you, Mr. Ross. I'm sorry.

MR. ROSS: Your Honor, I was just raising the same objection that this is outside the scope, and to the extent it [113] goes to her credibility, I understand, but she has no basis for testifying about the Cooper maps or any of the other maps except the whole county plan.

JUDGE MARCUS: You may ask the question, but let's move along on this, Mr. LaCour.

MR. LACOUR: Absolutely.

JUDGE MARCUS: I take it the witness has not before this moment had a chance to review these. You might ask her that.

MR. LACOUR: Yes, Your Honor.

BY MR. LACOUR:

Q Dr. Davis, have you had a chance to review either of the illustrative plan 1 that I showed you a

moment ago or illustrative plan 2 that we're looking at right now?

A No, I have not.

JUDGE MARCUS: So you want to ask her a question just about how it looks; is that correct, Mr. LaCour?

MR. LACOUR: Basically, Your Honor, to the extent that I think the look of the 2021 map has featured heavily – it's a racial gerrymander.

JUDGE MARCUS: You may get right at it if you would like. Just ask the question directly.

MR. LACOUR: Thank you, Your Honor.

BY MR. LACOUR:

Q So, Dr. Davis, if you look here, we have a couple of

* * *

[227] of these redistricting guidelines does not affect your analysis?

A Well, different constraints will not affect the analysis possibly. You don't know until you do it, right? So there is, you know, you provide a set of inputs, and then the algorithm will give you based on those inputs. And if you are asking like what would happen if I changed the inputs, like I don't know because I haven't done that. All I can tell you is that given the inputs that I provided in my report, this is the results that I got.

Q Dr. Imai, let's move on to j(v).

A Okay.

Q And this criteria says, the Legislature shall try to preserve the cores of existing districts, right?

A Right.

Q And did you observe this criteria in your simulations?

A Yes. As I mentioned, I did incorporate this particular guideline.

Q So you did not consider this; is that right?

A That's correct.

Q Why not?

A Yeah. So as I explained, for the purpose of the analysis, okay, so this is like my – the goal – I'm trying to analyze whether or not race played a role in creating the districts under the enacted plan.

[228] In order to do that, I need to isolate other factors. So I need to isolate, you know, I want to just look at how the race played a role. So I need to isolate other factors.

If I impose this constraint, all the factors that went into the previous plan is going to be carried over, and it's going to affect my analysis. As a result, I will not be able to isolate the role the race played in, you know, in drawing the district boundaries under the enacted plan.

Q Dr. Imai?

A That's why – I haven't analyzed the previous plans, so I have no knowledge of what factors went in there.

Q So, Dr. Imai, is it right that if your methodology considered what the previous plans looked like, the cores of existing districts, that you would not be able to tell what was caused as a result of those existing districts and as a result of race?

A I would have a difficult time isolating the role of the race if I put this constraint.

As I said, many factors may have gone into the previous plan, which I haven't analyzed. And so that will – you know, I will inherit all of that into my analysis, which basically, you know, basically reduces – get rid of the whole advantage of simulation analysis is the power to isolate these different factors, so that's why I didn't do this.

Q Dr. Imai, would it be possible to set a limiting [229] constraint so that your simulations preserves 80 percent of the cores of previous districts?

A Yeah. I could – I could do that. I could incorporate that constraint, add that to my simulation algorithm, yes.

Q But that's not something that you have done?

A No.

Q Here?

A No. If someone provides – if someone wants to incorporate the specific definition of core, then, yes, the algorithm can handle that.

Q And so instead, though, your algorithm starts from a blank slate; is that fair?

A Yes. That's – blank slate meaning like, yeah, from scratch.

Q Right. Right.

A Yeah. But if I may add one thing. Is that okay? Or is that . . .

Q Sure.

A So even though I started from the blank slate in my one-MMD analysis, in my testimony, I mentioned that it was remarkable to see that one MMD, you know, overlaps in a great deal with District 7 on the enacted plan, which I assume that also means that overlaps significantly with the District 7 on the previous plan. So even though I didn't tell the algorithm where to create the MMD, when I told the algorithm to get one [230] MMD, it went there, and in the key difference was the Montgomery.

Q So, Dr. Imai, doesn't ignoring some of these factors, cores of districts, communities of interest, et cetera, doesn't that guarantee that your simulated plans may not capture a true representative sample?

A So the captures – I have a mathematical theorem that says it captures – you present a plan under the set of criteria that I specified. If you change the set

of criteria, then, you know, the population of the plans are changed so no longer my sample is guaranteed to be representative of that new population, if that makes sense.

So the representativeness is all relative to what factors are used for the simulation.

Q Thank you, Dr. Imai. I am going to take these guidelines down.

And then, Dr. Imai, I am going to direct your attention to page 9 of your report.

A Okay.

Q Milligan Exhibit 1, M-1.

You say in paragraph 26 that you show, quote, the way in which the enacted plan deviates from the simulated plan implies that race was a predominant factor in drawing the district boundaries of the enacted plan. Did I read that correctly?

A Yes.

[231] Q What do you mean by implies, Dr. Imai?

A Presents empirical evidence for that.

Q Okay. And, Dr. Imai, this conclusion would apply not only to the enacted plan, right, but any comparison plan that was compared to your simulations?

A I don't want to say that because it depends on the purpose of the analysis if that – I guess I'm not understanding exactly what you're trying to ask. Sorry.

Q So let's say an enacted plan that's different than the plan that actually is enacted, and you still did the comparison. You did the comparison exactly the same. Wouldn't your conclusions apply to that plan, as well?

A I – I feel uncomfortable speculating that because like on this, I have a plan in front of me. It's really hard for me to know whether, you know, I don't want to sort of draw conclusion about something like a hypothetical. I feel uncomfortable doing that.

Q Let me back up. I think I have asked a poor question.

A Yeah.

Q So what you conclude or what you present here is that if a plan deviates from your simulated plans, that implies race was a predominant factor; is that right?

A In this particular setting. In this particular, you know, my analysis setting. I just feel uncomfortable speculating if there is another plan that looks very different, how do I, you

* * *

[268] Q It's not that it is impossible to split the Black Belt, it's just discouraged?

A Right. Try to reduce the number of splits, right. So fewer splits of those communities as possible.

Q But?

A But if you have to split, you have to split because the population constraint, you know, is 50 percent. You don't want to create the district who has fewer population than the, you know, the range that I specify.

Q And so in order to include Mobile and Baldwin County in a district, it appears it's necessary to split the Black Belt, right?

A That's correct. Yeah. If necessary to split those four, of five, I guess if you reached it.

Q Is that also the case for these southeastern counties that aren't included in your definition of the Black Belt but are isolated as a result of that definition?

A So, yes, those are also – yeah. So those are not part of the definition I was given. And, yeah, those are, you know, have to be – have to go somewhere. And often I think the, you know, the District 2 under the – under the simulated plan.

Q Dr. Imai, I just have a few more questions.

So between your initial and rebuttal reports, you generated a total of 30,000 simulated plans, right?

A That's correct.

[269] Q And of those 30,000 simulated plans, 20,000 of them included an MMD by design, right?

A That's right. One MMD by design.

Q How many of your 30,000 simulated plans included two MMDs?

A None. Because I didn't tell the algorithm to create a second MMD.

Q Dr. Imai, if none of your 30,000 simulated plans included two MMDs, wouldn't that indicate that race predominated in a comparison plan that did include two MMDs?

MS. EBENSTEIN: I'm sorry. Objection.

If I am understanding the question correctly, it's outside the scope of the one MMDs that Dr. Imai just testified he simulated.

JUDGE MARCUS: I am not sure I understand the question. So let's begin by having you rephrase it, Mr. Smith, and then we will see whether it's objectionable or not.

MR. SMITH: Sure, Your Honor.

JUDGE MARCUS: I don't understand the question as you put it.

MR. SMITH: Sure. I will reframe.

BY MR. SMITH:

Q Dr. Imai, none of your 30,000 simulated plans included two MMDs, right?

A That's correct.

Q So then a plan that does include two MMDs would be an [270] outlier, right?

MS. EBENSTEIN: Object – sorry.

JUDGE MARCUS: Do we have an objection?

MS. EBENSTEIN: I would object.

JUDGE MARCUS: There is an objection, and it is sustained as to the form of the question.

MR. SMITH: Your Honor, may I have a moment to consult with my colleagues?

JUDGE MARCUS: You sure can.

MR. SMITH: Thank you.

Your Honor, I pass the witness.

JUDGE MARCUS: All right. Thank you.

We're beyond – by my count, it's about 5:37 Central Standard Time.

Mr. Walker, I wasn't sure whether you were planning to ask questions or not. I know Ms. Ebenstein is planning to have some redirect.

Either way, it would be my intention to break at this point unless you had really only a few. I will give you whatever time you need, but we have gone beyond, and it's been a long day. So you tell me what your pleasure is, and we will proceed.

MR. WALKER: Your Honor, I do not intend to ask any questions.

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JUDGE MARCUS: Okay. So why don't we
break at this

* * *

[272] CERTIFICATE

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled
matter.

/s/ Christina K. Decker
Christina K. Decker, RMR, CRR
Federal Official Court Reporter
ACCR#: 255

01-04-2022
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BOBBY SINGLETON, et al., *
Plaintiffs, *
vs. * 2:21-cv-1291-AMM
JOHN MERRILL, in his *
official capacity as Alabama *
Secretary of State, et al., *
Defendants. *
* * * * * * * * * * * * * * *
EVAN MILLIGAN, et al., *
Plaintiffs, *
vs. *
JOHN MERRILL, in his * 2:21-cv-1530-AMM
official capacity as Alabama *
Secretary of State, et al., *
Defendants. *
* * * * * * * * * * * * * * *
MARCUS CASTER, et al., *
Plaintiffs, *
vs. *
JOHN MERRILL, in his * 2:21-cv-1536-AMM
official capacity as Alabama *
Secretary of State, et al., *
Defendants. *
* * * * * * * * * * * * * * *

TRANSCRIPT OF PRELIMINARY INJUNCTION
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THE HONORABLE TERRY F. MOORER,
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* * *

[476] Q And just to clarify, the American Community Survey data is administered and produced by the U.S. Census Bureau, correct?

A Yes.

Q So what are your conclusions generally regarding the socioeconomic profile of blacks and whites in Alabama?

A Well, whites outpace blacks in almost every single category. I'm hard pressed to think of one where there is not a disparity. And I outline that in my declaration and have a set of charts in the exhibits, which illustrate those disparities and is probably a little easier to get through, just looking at bar charts.

Q And those disparities across – span across education, income, and other metrics, as well; is that right?

A Yes.

Q Employment?

A Unemployment rates, just the whole nine yards, really. It's not – it's sad in a way that the disparity is that pronounced.

Q Thank you.

MS. KHANNA: Mr. Cooper, I don't have any further questions at this time. Your Honor, I pass the witness.

JUDGE MARCUS: Thank you. Mr. Davis?

MR. DAVIS: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. DAVIS:

[477] Q Hello, Mr. Cooper.

A Hello. Long time no see.

Q Mr. Cooper, if someone identifies as black in filling out the census, your report does not tell us how that person votes or consider how that person votes, does it?

A No.

Q Are you making any assumptions in your analysis about how that person votes, knowing nothing about him or her except the color of the skin?

A I make no assumptions about voting. That's the job of the *Gingles II* and *Gingles III* expert.

Q Is that true as well for someone who identifies as white when filling out the census?

A That's true. I cannot make any kind of statement one way or the other about an individual voter, no.

Q And then it would be also true for someone who checks both black and white?

A For the – for the census form, that's true. Of course, we have the voter registration data, which is limited to only one check, so, that's why I'm confident that all our districts are majority-black. Of the two that are considered, majority-black.

Q Do you have any understanding, Mr. Cooper, about whether Section 2 requires proportional representation for minority populations?

[478] MS. KHANNA: Objection, Your Honor. That calls for a legal conclusion.

JUDGE MARCUS: I will allow it insofar as he's telling us what may have shaped or motivated him in drawing it. We will take it. Overruled.

THE WITNESS: Well, my understanding is it does not require proportional representation.

BY MR. DAVIS:

Q Thank you.

A But I'm not a lawyer.

Q If I understood you correctly, Mr. Cooper, you said that when drawing illustrative plans for a Section 2 case, it is necessary to consider race. Was that your testimony?

A Race in a Section 2 case is always in the background as it really is in most plans one would draw anywhere in the country outside of litigation if you are really following traditional redistricting principles.

Q You say following traditional principals requires you to district on the basis of race?

A You have to make sure that what you are doing is not diluting a subset of the population that is minority in terms of their voting strengths.

Q At some point in the process, but that doesn't mean you have to consider race when drafting a plan, does it?

A Well, it's a traditional redistricting principle, so like [479] compactness or contiguity, you have to be aware of it as you are drawing a plan.

Q Even if it's necessary to consider race when drawing an illustrative plan, that does not mean that it's okay to make race the most important factor, though, does it?

A No. One should try to balance the various traditional redistricting principles as I believe I have done.

Q You've drawn many plans in many different jurisdictions, correct?

A That is correct.

Q When you're drawing plans for a jurisdiction, and I don't mean in litigation, I mean you're being hired by a state or a county or school board or someone to draw their plans, how often do you just start with a blank slate with no consideration of how the districts looked before?

A Almost never. I would always see what the so-called benchmark plan, the previous plan looked like.

Q Do you most often adjust the benchmark plan as necessary to come within appropriate population deviation?

A Yes. I mean, I'm always looking at things that need to be changed to comply with traditional redistricting principles and, of course, that would definitely include one person one vote.

Q Sure. Now, you said that you considered Alabama's districting guidelines, right?

[480] A I did. I reviewed them.

Q And you say you complied with our traditional districting criteria, correct?

A I believe so.

Q Okay.

A Criteria very general, so I think so.

Q Sure. Does our guideline not – do our guidelines not include the traditional districting criteria of preserving the core of districts?

A They do. And for the six plans I drew that include District 5 in north Alabama, they're almost identical to the District 5 that was drawn by the state. Because I'm also looking at other factors like the minority population and the reality that a second majority-black district could be drawn, the so-called core retention numbers on my plan might not match the state's. But that's okay. That's okay. I don't think that's something to be concerned about.

Q Okay. Well, we do. So but our guidelines don't say preserve the core of District 5, does it? It says preserve the core of existing districts?

A Right. But if you start with a plan that prima facia may be violating the Voting Rights Acts, you are going to change districts. And because of that, when I set about to create a second majority-black district, it was clear that I had to change other districts. It was not possible just to do a de [481] minimus change. It required, you know, significant changes to some of the adjoining districts, and because Districts 2 and 7 basically line up with the rest of the districts in the state, all the districts except for District 5 have to change.

Q Does your report express any opinion or your supplemental report that Alabama's plan violates the Voting Rights Act?

A Well, I am not a – I am not a lawyer or a judge, so I can't make that statement point blank. But I do believe that second majority-black district can be created while adhering to the traditional redistricting principles. Once you take that concept into action, you're going to change the neighboring districts. And because five of the districts are neighboring, that pretty much just leaves you with the only possibility of protecting core retention in District 5.

Q So is that a no?

A No to what?

Q That your report does not include an opinion that Alabama's plan violates the Voting Rights Act?

A Well, it shouldn't because I'm not a – I'm not a lawyer. I'm not a judge. I just drew a plan that demonstrates that in my opinion you can get a second majority-black district. And flowing from that would be perhaps a judicial decision that would say the enacted plan violates the Voting Rights Act.

Q Did you or did you not consider the traditional districting criteria of preserving the core of districts that [482] is in Alabama's guidelines?

A I believe I did within the constraints of creating second majority-black districts. I didn't radically change where the districts are located. And I – except in District 7, I did change District 5 in that particular plan just to make the point that the state could have drawn a more compact district. But beyond that, I have done a pretty good job of keeping the general areas

served by each district except for District 1 in the same part of the state. You're looking at me like you're appalled.

Q Mr. Cooper I have to apologize. I will say this to the Court, too. I am looking for the right – I promise you – I'm trying to share my screen, and I'm making sure that I get the right EF up. I am not meaning to look any way.

A Oh. I thought you were looking at me in a –

Q No, no.

JUDGE MARCUS: You all like fine to me. Let's just proceed with the next question, please.

BY MR. DAVIS:

Q Mr. Cooper, how does this plan preserve the core of existing districts? And this is your Illustrative Plan 7.

A Well –

Q Exhibit C-61.

A That's right. That's one where I did change District 5. I believe it's a more compact district. It keeps Huntsville [483] whole and does not put a voter in Tuscaloosa in a district that's almost in Chattanooga. So it's a different configuration. I'm not saying it has to be this way. I just thought it would make the point.

You could draw District 5 as the state is drawn. And in all the other plans, I basically have.

Q Mr. Cooper, did you observe traditional redistricting principle of avoiding incumbent conflicts with your peers in Alabama's guidelines?

A I did in Illustrative Plan 5.

Q In your other six, you did not observe that traditional districting criteria, did you?

A However, I would point out those plans could in all cases probably be modified such that the incumbent in district – in District 2 could be put in District 2 if not by way of a whole county, all of Coffee County, which is really quite populace, certainly it could be split, and the incumbent could be put in District 2.

Q Is it true –

A There would be many options for that.

Q Is it true –

A I want –

JUDGE MARCUS: Just let him finish, please. You may finish your answer, Mr. Cooper.

THE WITNESS: Oh. I just didn't want to introduce [484] more than six splits to any plan. So for that reason, I didn't, for example, split Coffee County to put the incumbent in the District 2. But there would be other variations. And there's one on the table now that does that. So I have protected all incumbents.

BY MR. DAVIS:

Q Is it true that in six of your seven illustrative plans, you do not avoid incumbent conflicts?

A In six of the seven? But in any of those, I could have probably protected the incumbent and kept a plan in place with two out of seven majority-black districts. It might have required an extra county split, though.

Q Have you ever lived in Alabama?

A No, I have not.

Q Have you spent any time speaking with Alabama voters or election officials about what local communities of interest may be?

A No. I mean, I have spoken with folks from Alabama. But I have not spoken with election officials.

Q What makes you think that you are better able than 140 legislators who live in Alabama and represent local districts – what makes you think you are in a better position than them to balance traditional criteria where they conflict?

MS. KHANNA: Objection, Your Honor. That mischaracterizes his testimony. I don't think he's ever said [485] he's better able than the legislators.

JUDGE MARCUS: I will let him answer the question. You may answer.

THE WITNESS: I think in the final analysis, even if this case is ruled in our favor, the Legislature will get the first opportunity to develop a remedial plan, and more often than not, that's what happens. Sometimes it doesn't happen. Like in say South Dakota, when ultimately the Legislature refused to create a majority Native American district, so the judge just finally had to order. But normally the Legislature will have the opportunity to develop a plan.

In fact, in 2019, in Mississippi in the plan I referenced earlier in my testimony, where I was a consultant, and the plaintiffs' expert in a lawsuit, Section 2 lawsuit that created a new state Senate district in the Delta, initially the judge ordered my plan into place. But then the Legislature came back and said, look, we want to develop a plan. The judge allowed them do that, and the court ordered plan in the end was a plan developed by the Legislature. It included a majority-black district, though.

BY MR. DAVIS:

Q Mr. Cooper, did I understand you correctly when you said you kept the city of Mobile whole that you split precincts in order to do so?

A Some precincts had to be split in order to get to zero [486] population deviation.

Q Okay. Did you have to split precincts in order to keep the city of Mobile whole?

A In the configuration that you see in Illustrative Plan 6 and 7, I believe I did have to do that in order to meet one person one vote zero deviation.

Q Why couldn't you have made that adjustment somewhere else on the map?

A Well, perhaps I could have, but then that would have introduced another county split. Yeah. There are an infinity of plans out there one can draw. These are just seven illustrative ones. So I am not saying it couldn't be done. I just haven't produced such a plan so far.

Q Why did you not produce any plans that kept Mobile County whole?

A I think that more than likely if you keep Mobile County whole it becomes a little problematic to create two majority-black districts.

Q Does it make it impossible?

A Well, maybe not, but it would require a number of other county splits, I think.

Q Did you testify in direct, Mr. Cooper, that in Florida, you have used the measurement of non-Hispanic black instead of any-part black?

A No. No. I just said that there may be some places in

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[536] CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Christina K. Decker
Christina K. Decker, RMR, CRR
Federal Official Court Reporter
ACCR#: 255

01-05-2022
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BOBBY SINGLETON, et al., *
Plaintiffs, *
vs. * 2:21-cv-1291-AMM
JOHN MERRILL, in his * January 6, 2022
official capacity as Alabama * Birmingham,
Secretary of State, et al., * Alabama
Defendants. * 9:00 a.m.
* * * * * * * * * * * * * * *
EVAN MILLIGAN, et al., *
Plaintiffs, *
vs. *
JOHN MERRILL, in his * 2:21-cv-1530-AMM
official capacity as Alabama *
Secretary of State, et al., *
Defendants. *
* * * * * * * * * * * * * * *
MARCUS CASTER, et al., *
Plaintiffs, *
vs. *
JOHN MERRILL, in his * 2:21-cv-1536-AMM
official capacity as Alabama *
Secretary of State, et al., *
Defendants. *
* * * * * * * * * * * * * * *

TRANSCRIPT OF PRELIMINARY INJUNCTION
HEARING VIA ZOOM CONFERENCE
VOLUME III
BEFORE THE HONORABLE ANNA M. MANASCO,
THE HONORABLE TERRY F. MOORER,
THE HONORABLE STANLEY MARCUS

Proceedings recorded by
OFFICIAL COURT REPORTER, Qualified pursuant
to 28 U.S.C. 753(a) & Guide to Judiciary Policies and
Procedures Vol. VI, Chapter III, D.2. Transcript
produced by computerized stenotype.

* * *

[549] that Mr. Davis and Mr. Walker have a chance to have a full day to get Bryan on. I only say that if you spill over into tomorrow with *Gingles I, II, and III*, I want to make sure that we have a chance for Bryan to be heard. That won't be a problem for you, Mr. Naifeh?

MR. NAIFEH: I don't believe so, Your Honor. We expect that we will get through all of the *Gingles* experts today. And Mr. Bryan, if we don't get to him today, he would still have all day tomorrow.

JUDGE MARCUS: So I take it, Mr. Davis, Bryan is set up for either late today or all day tomorrow starting in the morning?

MR. DAVIS: Yes, Your Honor. Whether we begin today and finish tomorrow or whether we begin tomorrow, we will be ready to go.

JUDGE MARCUS: Thanks very much, and you may proceed, counsel, with your next *Gingles* witness.

MR. NAIFEH: The Milligan plaintiffs would like to call Dr. Moon Duchin.

MOON DUCHIN,

having been first duly sworn, was examined and testified as follows:

JUDGE MARCUS: Would you be kind enough to state your name for the record.

THE WITNESS: Sure. My name is Moon Duchin, and I am

* * *

[565] BY MR. NAIFEH:

Q Going back to the questions you were asked to consider, were you able to develop any illustrative plans demonstrating whether it's possible to create two majority-black districts in Alabama?

A Yes. My report includes plans that I called plan A, B, C, and D.

Q And did you use any software to develop the illustrative plans?

A I did. I used software in a few ways. As a first step, as an exploratory step, I used algorithms developed in my lab to create – to generate large numbers of different possibilities that would show me if it was possible to find two majority-black districts. And I found that it was possible. My randomized algorithms

found plans with two majority-black districts in literally thousands of different ways.

Convinced that that was possible, I then turned to drawing by hand. And I would emphasize that the role of the maps found by the exploratory algorithms was just then inspiration. Seeing that it was possible and with some of the ideas about how it was possible, I then started with a blank slate and drew by hand.

I will say a little bit more about that. The hand drawing was done first with the second software package developed in my lab. And here, let me mention that all these software packages [566] are public, open source, available for inspection by the public and by counsel at any time.

So the second package is called Districtr. And in it members of the public can draw their own plans. And we use Districtr – I use Districtr to draw plans at the level of VTDs or precincts. We haven't talked about those yet. But those are the units of census geography that look a lot like the precincts that people vote in.

So the second stage was to draw at the VTD level. And then finally, to balance population, I used finer tools, and in particular, we have a number of Python packages that we use to see the demographics down to the block level, and to understand the properties of plans.

Q And you mentioned Python. That is the – is that a programming language?

A Python is a common open source programming language. And it permits many packages, such as what are called Pandas for working with large data frames and GeoPandas for working with Geo-spatial data. I would say that Python is the language of choice in data science.

Q Is Python frequently used in redistricting?

A I would say that it is.

Q You mentioned that when you hand drew plans, you started from a blank slate. So just to clarify, does that mean – did you – did you start from an existing plan?

[567] A No. Only used some of the concepts I had seen in plans that were found by the exploratory algorithms, but literally started with an empty map of the state when drawing.

Q Okay. And what kind of data did you use to develop the illustrative plans?

A Again, here, as in my research, by far the largest data set is the one from the U.S. Census Bureau, called the PL 94-171. That is block level demographic data that the bureau was directed to compile specifically for redistricting purposes. That is the express function of this data set.

In addition, there are number of other highly useful Census Bureau products, such as their TIGER/Line Shapefiles that give you the geographical units. Their American Community Survey, which is an annual

survey from which we extract information about Citizen Voting Age Population and so on.

Q Okay. Are these the same types of data that you would normally use to create a redistricting plan?

A Definitely.

Q And you mentioned census geography such as census blocks. What are census blocks?

A Okay. So the census maintains a geographical hierarchy of units, which has a central spine with six levels. It starts at the nation, as you would expect, subdivides into states, from states to counties, within counties the next unit is called census tracts. Those divide into block groups which divide [568] into blocks.

So blocks are the smallest units of census geography. They're sometimes called the pixels of redistricting. They're the littlest units that you can use as building blocks. There are a great number of them. In the 2010 census there were over 11 million census blocks in the nation. They range in population from 0. They're a substantial number of census blocks 0 population to typically a few hundred people, although sometimes you will find census blocks with much larger population, such as if there are group quarters like prisons or dormitories. So that is a brief description, I hope, of census blocks.

Q And you also mentioned VTDs. Can you tell us what a VTD is, what VTD stands for and what a VTD is?

A Sure. There's a redistricting data program, an office within the Census Bureau, and they undertake every 10 years to communicate with the states and collect information on the boundaries of precincts, which are, as we all probably know, units of election administration that are maintained typically at a local level.

And so the bureau collects this information and compiles them into a product called VTDs. They say that stands for voting district, but most people call them voting tabulation districts, VTDs. And so you should think of those as the Census Bureau's version of local election administration units. [569] That makes them particularly useful for redistricting because since they're in the census hierarchy, we can accurately measure demographics, but they're also well-coordinated with local elections, local election administration.

Q And did you use beyond the information from the Census Bureau, did you use any other information or consult any other information when preparing the illustrative plans in this case?

A I did. And some other sources are listed in my report. But in particular, I consulted the enacted plans from the state, which I obtained from the state's web sites. I looked in particular at the congressional plan, of course. But also, for example, at the school board of education plan prepared by the state, enacted.

Q And did you consult the state's redistricting guidelines?

A I did. I did consult the state's redistricting guidelines.

Q You mentioned the State Board of Education plan. What did – why did you obtain information from the State Board of Education plan?

A The board of education plan was of particular interest to me because it's an eight-district plan. We've already heard that the congressional district plan has seven districts. But the board of education plan has two that are majority-black. So I was particularly interested to see how the state would con instruct a second majority-black district.

[570] Q And were there other features in the State Board of Education plan that were relevant in drawing the illustrative plans in this case?

A One of the things that you'll notice across my plans is the – having to do with Mobile County and with the city of Mobile. And I was interested to see how that would be handled in a second majority-black district. And so I looked to the board of education for an example.

Q Is it your regular practice to look at the redistricting plans for other governmental bodies in determining how to draw an illustrative plan for a different set of districts?

A Yes. Definitely. I would call that a standard practice of mine.

Q Okay. And you mentioned the Census Bureau's American Community Survey or ACS. What did you use ACS data for?

A In this case, I only used ACS data to estimate what's called BCVAP or Black Citizens Voting Age Population as described in my report. I suppose I should clarify. Not only Black Voting Age Population, but the Citizens Voting Age Population of various groups.

Q Okay. How did you use the data and the information that you mentioned to create the illustrative plans?

A Well, as we discussed, my main question was whether I could make plans that had two majority-black districts while showing great respect for the other additional districting [571] principles. And so the main way that all this data was used was, in fact, many of the redistricting principles touch on census and demographic data. But in particular, I needed to make sure that the districts I was creating would be over 50 percent black.

Q Okay. And just sort of mechanically, how do you create a redistricting plan using census data?

A Well, as I described, when drawing, I started out with the Districtr program, which lets you select a paint brush like tool and start to color in the VTDs of the state. You can also turn on a feature that captures whole counties. And because county preservation is important, as I'm sure we'll discuss, I tried to take whole counties into a district whenever possible.

So typically the way you complete a plan is by first drawing with the largest units counties in this case, getting to a place of very coarsely balanced population, and then going to the next smaller units to tune and balance. And so in this case, from counties, the next units would be VTDs.

You can draw a very reasonably balanced plan, a 1 percent balanced plan at the VTD level. But since, as I'm sure we'll discuss, it's the standard practice to balance congressional districts much more tightly. At the last stage, you then break those VTDs down to blocks in order to tune the population.

Is that what you had in mind?

Q Thank you. Yes. That's helpful.

[572] A Okay.

Q And so you – is it fair to say that you drew your illustrative plans at the census block level?

A In the end, yes. I found that it was necessary to break some VTDs in order to balance the population. And so I did so at the block level, yes.

Q Okay. And when you tune to the block level and see VTDs and then tune the population of block level, how do you decide where to split precincts?

A Right. So when splitting precincts – so, first, I tried to keep as many counties whole as possible but had to break some counties. And then when you decide which precincts to split, those would typically be within the already split counties.

By far, the largest consideration when splitting precincts is one of balancing the population. And so by far, the primary consideration is the total population of those blocks so that you can find just the right sizes to balance the population.

Q And when splitting precincts to balance the population and selecting blocks to balance the population, do you ever decide where to split the precinct on the basis of race?

A I would describe the priority order this way: When you have to split a VTD looking to balance population, as I just said, by far, the first thing that I look at is the total population of the blocks. After that, the next consideration I [573] had was compactness, trying to make kind of less eccentric and more regular boundaries between districts.

I – over the course of the many draft maps made, I did sometimes look at race of those blocks, but really, only to make sure that I was creating two districts over 50 percent. Beyond ensuring crossing that 50 percent line, there was no further consideration of race in choosing blocks within the split VTDs.

Q Are you familiar with traditional redistricting principles?

A Yes, I am.

Q And what are they?

A Okay. Well, there are many. But I would identify what I call a big six.

So let me very briefly outline them. First is population balance, or one person one vote. And we've discussed that already. That's the idea that we should balance total population across the districts in a plan. The next and also a federal requirement is minority electoral opportunity. And that's through the lens of the Voting Rights Act of 1965, as well as equal protection in the constitution.

So those are two nonnegotiable federal requirements.

Next, I might list two that are fairly easy to measure. And those – although not unambiguous, but still readily quantifiable, and those are compactness and contiguity. And [574] then we come to two that are a little bit I would say harder to measure, but nonetheless very important. And that's respect for political boundaries. By that, we usually mean a priority on keeping intact the counties, cities, and towns generally the municipalities, of a state. And finally, respect for communities of interest.

Q And did you consider those principles when developing the illustrative plans?

A I certainly did.

Q Did you also consider the redistricting guidelines adopted by the state's reapportionment committee?

A I did.

MR. NAIFEH: And, Mr. Ang, can you please pull up Milligan Exhibit 28? This is Document 88-23.

BY MR. NAIFEH:

Q The committee's guidelines include additional criteria beyond those you just mentioned?

A They do. And if we look at this, we can see the whole first page concerns itself with population and minority opportunity to elect and equal protection. And then if we go on to the next page, that very next on the list is contiguity and compactness, which I've mentioned. At that point, this document gets to Alabama state constitutional requirements, which repeat some of the previously listed concepts, and cite, you know, once again cite contiguity population balance, [575] discuss the number of districts.

After that, we get to J, which within J, we introduce other principles that are frequently discussed in redistricting, such as consideration for incumbency. This is where communities of interest are cited. And if we advance to the next page, we will see in part (v) of part j. mention of preservation of the cores of existing districts.

I would note that in my reading of this, I noticed in part G here that the criteria identified within j. are stipulated not to be listed in priority order.

To me, the reading that I took from this, and I think the reasonable reading is that the ones listed before part j. should be regarded to take precedence. And so I did take this document quite seriously in listing

the federal requirements first, followed by compactness and contiguity with concepts like incumbency consideration and core preservation clearly lower ranked.

Q So in your understanding, the committee guidelines create a higher hierarchy of certain principles over others?

A I think they do. And I think they do so in a manner consistent with what I see in numerous other states.

Q Thank you.

MR. NAIFEH: Thank you, Mr. Ang. We can take this exhibit down.

BY MR. NAIFEH:

[576] Q Dr. Duchin, is it possible that different traditional redistricting criteria might conflict with one another?

A Yes. It's not just possible, it's common place. The criteria are often intention. And to give just a few examples of that, I think it's clear from what I said a moment ago that exact population balance requires you to break up units and so its intention with respecting political boundaries pretty clearly.

Another classic frequently observed example is that compactness can be intention with communities of interest. If you have a well-identified community with important shared interests that itself is residentially located in kind of elongated configuration, then

you have a choice to make because keeping that community whole might come at a cost to compactness of your district. That's a frequently observed instance among many where the principles can be in conflict.

Q In your experience, is it common to have to make trade offs to – in observing different redistricting principles?

A Absolutely. I would say – go so far as to say that redistricting is all about those trade offs.

Q When you prepared the illustrative plans in this case, did you use – sorry. I've got that covered.

Did you – are the illustrative plans you developed the only potential plans for a seven-member congressional district in Alabama?

[577] A Certainly not.

Q Are the illustrative plans that you developed in this case the only potential plans for a seven-member congressional redistricting plan in Alabama?

A They're far from the only plans. They're far from – as you heard me say before, far from the only ones with two majority-black districts. I've seen thousands of examples, and I know that overall, the universe of possibility in Alabama is in the many trillions of trillions. So we're talking about very large number of possible plans over all.

Q And so just to follow up on that, if you had a different set of redistricting – of priorities among the redistricting principles, you could draw – you would

draw a different plan that still contained two majority-minority districts; is that right?

A That's absolutely true. And so as you heard me say a moment ago, after the – what I took to be nonnegotiable principles of population balance and seeking two majority-black districts, after that, I took contiguity as a requirement and compactness as paramount following the guidelines.

It would be completely reasonable to take plans like mine to take districts, something like my Districts 2 and 7, which then kind of forces District 1 to look more or less as it does. But with the remaining four districts, there's quite a lot of latitude. You could adopt, then, a priority on maintaining [578] district cores, and easily produce a plan that performs better in that regard, but you would do so at a cost particularly to compactness.

So there are certainly trade offs. And I took the reading of the guidelines to put a very high priority on counties and compactness. But while retaining two majority-black districts, many other choices could be made.

Q And in seeking to draw two majority-minority districts, was your goal to maximize the Black Voting Age Population in those two districts?

A Certainly not. We've seen from the state that it's possible to have a substantially higher BVAP in a district, and I can tell you that it's possible, while

having two districts to still have a substantially higher BVAP in a district, that was simply not my goal.

Q And were there times in drawing the illustrative plans when you made the decisions that had the effect of reducing the Black Voting Age Population in one of the minority-majority black districts in order to satisfy other redistricting principles?

A Definitely. I took, for example, county integrity to take precedence over the level of BVAP once that level was past 50 percent.

MR. NAIFEH: Mr. Ang, can you please bring up Exhibit M-3? This is Document 88-3, and turn to page 7.

[579] Dr. Duchin – Mr. Ang, could you zoom in on the table?

BY MR. NAIFEH:

Q Dr. Duchin, please take a look at Table 3, which is labeled, Demographics Broken Out As a Comparison of Black and White Population.

A Yes.

Q What does this table show?

A This table shows the BVAP, the WVAP, BCVAP, and WCVAP. In other words, the black and white shares of Voting Age Population and Citizen Voting Age Population by district in each plan.

Q And in each plan, that includes in the enacted plan HB-1?

A That's right. HB-1, as well as my plans A through D.

Q Okay. And turning down on the table labeled BVAP at the top left, what does this table show?

A This shows that – as I said earlier, HB-1 has one majority-black district, and then drops off to around 30 percent while my plans A through D all have two districts over 50 percent black.

Q And what definition of black is used to calculate these percentages?

A Yes. So here still I'm using that expansive definition that's sometimes called any-part black.

Q And then looking over to the table at the top right labeled BCVAP, what does this table show?

[580] A So this is the black share of Citizen Voting Age Population. I will note that sometimes in voting rights enforcement, we look to Citizens VAP, CVAP, because it's taken to be a closer proxy to the electorate because citizens are eligible to vote. And so here I look at BCVAP and find that it – generally similar that HB-1 still has only one majority-black district, and all four of my plans by this way of counting still have two.

Q And in the BCVAP table, which definition of black was used to calculate BCVAP?

A So here I'll just say very briefly, I used the ACS to calculate the citizenship share of adults for each racial group and then applied that to the any-part black population.

Q So, again, using – it uses any-part black to estimate the citizenship share of each district?

A To be exactly precise, the share, the rate of citizenship does not use any-part black because it's done from the ACS, which doesn't have the ability to count any-part black, so that citizenship rate is used with a single-race black definition, and then is applied to the any-part black map of the state.

Q Okay.

A This is described in detail in the appendix to this report.

Q Okay. And using the any-part black category for BVAP, are there two districts in each of your four plans that contained

* * *

[596] M-28? This is again the redistricting guidelines Document 88-23.

Mr. Ang, can you scroll down? I believe it's the third page. Back up one.

THE WITNESS: There we are.

BY MR. NAIFEH:

Q It's at the bottom of page 2. Is that the definition that you were referring to earlier?

A Yes. And so recognized similarities of interests, including but not limited to ethnic, racial, economic, tribal, social, geographic, or historical identities.

Exactly.

Q And it says there at the bottom that it can include?

A It can include in certain circumstances political subdivisions, such as counties.

MR. NAIFEH: And can you go on to the next page, Mr. Ang?

THE WITNESS: Great. Counties voting precincts, municipalities, tribal lands and reservations, or school districts.

MR. NAIFEH: Thank you, Mr. Ang.

BY MR. NAIFEH:

Q And does – in your understanding, does the community of interest principle mean that an entire congressional district must form a single community of interest?

[597] A No. And I think that's sometimes a common misunderstanding. I don't think that respect for communities of interest means that every district should itself be a single unitary community. That

wouldn't work because communities can be of all sizes and are not necessarily the exact size of congressional districts, which after all, are very large, over 700,000 people.

Instead, I believe that what it means is that communities should be taken into account when you draw so that either they're kept whole within a district, or if it's appropriate, split among several in a way that amplifies their opportunity to be heard by their representative.

Q So, in other words, there may be more than one community of interest in a given congressional district?

A There certainly will, without fail, be more than one community of interest within a congressional district.

Q And are the criteria for or the definition of community of interest, is that an objective definition?

A Well, as it's written in law or in guidelines like these, it's, of course, somewhat vague. There have been efforts to try to make it more concrete and more quantifiable, that usually start with a public collection process, as I mentioned a little earlier.

Q So when you are serving the public about their communities of interest, is it possible that different people might [598] identify with different communities of interest?

A It is a certainty. When you ask people about their communities, the nature of community is that you will get many different kinds of account. Some of them will be continent and will allow you to create a kind of small consensus so that you have a community supported by the testimony of many people.

But inevitably, on even more than what some of the other principles, there are trade offs, because communities can and will overlap. So sometimes it's impossible to preserve one without breaking another. So even within this principle, there are trade offs to consider.

Q When developing your illustrative plans in this case, what communities of interest did you consider?

A So the two communities of interest that I prioritized are the two that I mentioned earlier, which are urban cores and the 18 counties that constitute the rural Black Belt.

I will mention that I am aware that there are many, many other important and salient communities in Alabama, and I prioritized these two that I believe to clearly and unambiguously correspond to the language in the guidelines.

Q And in your opinion, do the illustrative plans respect communities of interest?

A Yes. My plans A through D are designed to do so. And one way that they do so is by taking upwards

of 16 out of the 18 Black Belt counties in each case and keeping those in [599] majority-black districts.

Q And you mentioned also that municipalities or counties or other political subdivisions can also constitute a community of interest. Did – in your opinion, do the illustrative plans respect those communities of interest?

A They do. There's a marked respect not only for counties, which I think is unmistakable in the plans, but also for municipalities.

And I will note there that because the technical boundaries of municipalities can be very erratic, that on a community level, it's often that urban core that's most salient from a community.

Q You also testified the guidelines – the redistricting committee's guidelines include as an additional criteria the cores of prior districts?

A Yes.

Q What does preserving the cores of prior districts mean?

A Informally, it means that new districts should resemble the previous districts. Often, that's measured in one of two ways; by looking at the area overlap or the territorial overlap between a new district and its corresponding its counterpart in the older plan, or by looking at the population that's either retained or displaced.

Q And do the illustrative plans preserve the cores of prior districts?

[600] A No. I would characterize my Illustrative Plans A through D as not particularly preserving the cores of the prior districts.

Q And why is that?

A I judge it to be impossible to have as high of a core preservation as, for instance, you see in the newly enacted plans, while also having two majority-black districts. Just to expand on that briefly, since the older plan has one majority-black district, and then a significant drop off to, you know, about 30 percent, it's again mathematically impossible to create two majority-black districts without a significant level of population reassignment from one District to another. Because I regard the protection of minority electoral opportunity to be a nonnegotiable federal requirement, that necessitates a significant level of core displacement.

Q Okay. And so that – and then in the outside of those two majority-black districts, were there – can you explain why your plans don't preserve cores to the extent it's of the enacted plan?

A Yes. Absolutely.

So I read the guidelines to put core displacement as a priority below compactness and the preservation of counties, in particular compactness. And so I would note that one could take my illustrative plans, retain something very much like my [601] Districts 2 and 7 and therefore District 1, and with the remaining four

districts, one could adopt a different prioritization. And indeed if core preservation were elevated at that point, it would be quite easy to reconfigure those four districts to more resemble the previous enacted plan. I will just note that you would be doing so expressly at the cost of compactness.

Q So, in other words, you read the guidelines as requiring compact districts more than core preservation, but if you read them the other way, you could preserve cores to a greater extent than you did?

A I think it's difficult to read them another way, but if you elected to prioritize cores over compactness, you certainly could do so, and that would greatly improve those displacement numbers in my plan while maintaining two majority-black districts.

Q And you also testified earlier that protecting minority voting strength is a traditional redistricting criteria. What does it mean to protect minority voting strength for avoid dilution of minority voting strength?

A Well, in the context of *Gingles I* demonstration, it means to draw districts that have a majority of – in this case, Black Voting Age Population while still being maximally respectful to the other traditional principles. In other words, in other words, what's at issue here is the opportunity [602] to elect candidates of choice.

Q And what do the illustrative plans do to un-able that opportunity?

A Well, in particular, here they pass the threshold of 50 percent plus 1, so they create two majority-black districts in which I believe together with the evidence of other experts we can see there will be a clear opportunity to elect candidates of choice.

Q And so based on what you have told us so far today, did you form an opinion as to whether the black population in Alabama is sufficiently numerous and geographically compact to comprise a majority of voting age population in two congressional districts?

A I did. As we heard, there were two majority-black districts, and the plan as a whole is highly respectful of other traditional districting principles, and in particular, is highly compact. The compactness of the plan is itself a demonstration that the population is compact enough to do so.

Q And are the illustrative plans the only potential remedy for vote dilution in Alabama's congressional plan?

A They are far from the only possible remedy, and I leave it to the Court to determine whether majority-black districts are necessary as a remedy. And here, they're clearly demonstrated to meet the *Gingles I* requirement.

[603] MR. NAIFEH: Thank you, Dr. Duchin. I have no more questions at this time.

JUDGE MARCUS: All right. It looks to me like this might be a convenient time for our break. I have 10:35 your time in Alabama Central Standard

and 11:35 in Eastern Standard Time. We'll take a 15-minute break.

I take it, Mr. LaCour, you are going to conduct the bulk of the cross, or the cross for the Secretary of State?

MR. LACOUR: That's correct, Your Honor.

MR. NAIFEH: Your Honor, actually, there was one more issue I wanted to raise with Dr. Duchin.

JUDGE MARCUS: Sure. Let's go back so you can finish your direct, and then we'll break. Fire away.

MR. NAIFEH: Mr. Ang, can you please bring up Exhibit 48, M-48, that's Document 92-1? And I will note for the Court and for the record that this is one of the exhibits that defendants have objected to, and I would like to lay the foundation for getting it admitted.

JUDGE MARCUS: Sure.

BY MR. NAIFEH:

Q Dr. Duchin, on the screen is the document that has been marked as exhibit M-48.

MR. NAIFEH: Mr. Ang, could you scroll through? I think it's three pages.

BY MR. NAIFEH:

* * *

[644] weren't worried about balancing the other factors?

A Well, I think my best and fullest answer would be that I do believe other prioritizations of criteria are possible while retaining two majority-black districts. And that in particular as I think I mentioned in direct, if you kept something very much like my District 2 and 7 and, therefore, 1, you have a great deal of latitude with the other four districts to reorder the priorities as you might see fit.

Q But maybe with this particular configuration of 2 and 7, you wouldn't have latitude down to just six splits in the counties; is that fair?

A Sorry.

Q I'm sorry. Go ahead.

A Thanks. That's not something I'm prepared to answer in a speculative fashion looking at the map. But something I could certainly sit down with mapping software and explore.

Q And I'll just point you here. CD 7, this was from your report, and we looked at these numbers earlier. I am happy to go back if you want to double check them. But I put down that it was 50.24 percent any-part Black Voting Age Population, and if I think we said that 1 percent of Voting Age Population of a typical district is about 5,600 people, so we're talking less than 2,000 people would be your margin for CD 7, correct? So does that sound right?

A What exactly is the question? Is the question about [645] removing 2,000 people?

Q If you removed – so if you removed 1,000 black people of voting age from CD 7 and you replaced them with 1,000 non-black people of voting age, that would bring your number down below 50 percent, correct?

A I don't think 1,000 would be enough from the numbers you were quoting before. It sounded like maybe a few thousand would, but, again, I'd want some time to sit down and get those numbers just right.

Q Okay. In any event, the margins are at least – the margins are somewhat slim for CD 7, fair enough?

A I think that the standard is 50 percent plus one person. But 50.24 is certainly less than, say, 51 percent.

Q Uh-huh. I will move on to plan C. Zoom out just a little. Can you see that?

A I can.

Q Okay. And as with the other plans, the map on the left comes from Milligan Exhibit 3 page 4. That's your initial report. The map on the right that corresponds to it is from Tom Bryan's supplemental report, Defendants' Exhibit 4 at page 73.

So here we've got District 2, and I think this comes from page 8 of your report that shows that it is at 50.06 percent Black Voting Age Population, which by my math, equates to about 350 people of voting age? Does that sound sort of in the [646] ballpark?

A I think you're asking is it true that .06 percent of the voting age population of a district is a few hundred people?

Q Uh-huh.

A That sounds reasonable to me.

Q Okay. Great.

My question here – we have nine splits in this particular map. I wanted to first ask about the ones here in the southwest corner of the map. What traditional districting principles led you to draw that sliver through Washington and Clarke counties?

A Well, I don't specifically recall that decision juncture, but I can imagine that one possibility might have been the compactness of District 7.

Q Okay. What leads you to say that, just looking at the map here?

A Well, again, if we're looking at the Polsby-Popper measure, or indeed at the Reock measure, in either of those cases, the idealized shape is a circle.

Q Uh-huh.

A And I can see that this – it's conceivable – since you are asking me, I think, to speculate, it's conceivable that this decision was made in order to produce a somewhat rounder District 7.

Q Okay. And would another way to do that be to sort of [647] borrow from that hydraulic analogy, move

counterclockwise now to maybe pick up some of this intrusion into Jefferson County, and then in the process, make these counties whole?

A There are honestly innumerable choices that you face that's really only one of many conceivable ways to balance the decision in a different manner.

Q Okay. And so there are numerous ways you could have also potentially made either of these counties whole either as part of District 7 or as part of District 2, correct?

A That's correct. And I think that you will find some examples in the other illustrative plans.

Q Okay. And you think one reason that there are nine splits in counties in this plan as opposed to six splits in counties is because of your – the weight you gave to – I apologize to flip around there – was because of the weight you gave to the criteria of ensuring two majority-black congressional districts?

A There's no question. And I have consistently acknowledged that I took minority electoral opportunity to be a nonnegotiable principle sought in these plans.

I will mention here you're also seeing in some of these decisions a high priority on compactness and, of course, on contiguity.

Q And we'll get to that in a minute.

Turning next to plan B –

[648] MR. NAIFEH: Before we move on to plan B, I want to make sure that all of these demonstratives are being marked. So I think we had one for plan B and one for plan C.

JUDGE MARCUS: Did you want to mark this one B? This is plan B?

MR. NAIFEH: This is D. We also saw B and C.

JUDGE MARCUS: So you are asking him to mark B and C as well as D?

MR. NAIFEH: Yes, Your Honor.

JUDGE MARCUS: Any objection to doing that, Mr. LaCour? Because what you are showing is not exactly the exhibit as it appears in Milligan 3. Plan C, B, and A are what existed, except you typed in some stuff at the top, right?

MR. LACOUR: Exactly. No objections, Your Honor, for plan B.

JUDGE MARCUS: Why don't we do this: Why don't we just mark your modifications to Duchin's plans B, C, and D as Defendants' identification 3, 4, and 5? If I have the numbers right, I think that works.

MR. LACOUR: Yes, that's exactly right.

JUDGE MARCUS: Does that work for you, counsel?

MR. NAIFEH: Yes, Your Honor.

JUDGE MARCUS: All right. So the record is clear, the exhibits being shown to Dr. Duchin by Mr. LaCour are Illustrative Plans A, B, C, and D, which have been modified to [649] typing at the top of the page, county splits, and the percentage of APBVAP in each of Districts 2 and 7. Is that right?

MR. NAIFEH: In addition, they have also added a map from Defendants' Exhibit 4.

JUDGE MARCUS: That's on the other part of it. The other part of the page includes a defendants' exhibit from the report of the supplemental report of Mr. Bryan. With that caveat, exhibits 3, 4, 5 – would it be 3, 4, 5, and 6, Mr. LaCour, the four of them?

MR. LACOUR: I believe it's 2 –

JUDGE MARCUS: We have already marked – okay, so it's 3, 4, and 5 are marked as defendants' exhibits for identification. You may proceed. Thank you.

MR. LACOUR: Great.

BY MR. LACOUR:

Q Dr. Duchin, we now come to plan D. Thank you for your patience.

This is one that splits Jefferson County among three different districts, correct?

A That's correct.

Q Do you recall what percentage of Jefferson County's black residents ended up in your version of

CD 7 and what percent were placed into CDs 4 and CD 6?

A I don't think I ever calculated those percentages

* * *

[660] Q Or that compactness is required by federal law or Alabama law?

A I can't speak to whether it's considered to be part of Alabama law, not being an expert in Alabama law.

Q Fair.

A But I am aware that it's not considered to be federal law.

Q Okay. Did you look at Alabama practice, either in this past redistricting cycle or past decades to see whether it looked like the Legislature has been giving compactness that level of priority as opposed to core retention?

A My principle means of learning about Alabama practice was a study of the enacted plans from 2021 and from 10 years earlier in 2011. And as one often does, when trying to understand redistricting priorities, I did infer some priorities and interpretations from the properties of those plans.

Q And was respect for core retention one of the guiding principles that you were able to infer from

looking at the 2011 map as opposed – or when compared to the 2021 map?

A Oh, I certainly agree that core retention seems to have been highly prioritized in the creation of the 2021 plan.

Q Let's see. Turning now to communities of interest.

You referred this morning to the fact that there has not been a sustained effort to map out or quantify all the different communities of interest that might be present in the [661] state of Alabama; is that correct?

A Oh, I think that goes farther than my statement. I just said I wasn't aware of a state effort, and that I had checked the state's redistricting website to confirm that.

Q Did you look at past maps to see if you could infer from them any communities of interest?

A Well, I think it would be quite difficult to read backwards to reverse engineer, you might say, communities of interest from a map, particularly since, as I said this morning, I don't think that each district itself constitutes a unitary community.

But I did get some ideas about splittings from the state's earlier plans, and as I mentioned, from the state's current board of education plan.

Q Did you get any ideas about – the opposite of splittings – keepings together, if you will, from the past maps?

A Did I get any ideas about areas that were kept together, sure. By observation I could see some areas that hadn't been split. I'm trying to stay with the spirit of your question.

Q Okay. For example, how far back did you look at past maps from – past congressional maps from Alabama?

A As I've testified, I focused on the last two, on the maps from 2011 and 2021.

I have definitely reviewed some older maps, but that would [662] be longer ago and farther from the current process.

Q Okay. So you couldn't say, for example, if two gulf counties, Mobile and Baldwin, have been together in the same district for half a century or not?

A I couldn't. Not with a high degree of certainty. But I'm willing to believe that that's true at the congressional level. It's certainly the case that Mobile County is split in the current State Board of Education map, and that parts of Mobile, city and county, are connected to parts of the Black Belt.

Q I will have a few questions for you about a map in a moment. But returning to communities of interest. You said in your report that it was possible to identify several clear examples of communities of interest of particular salients to black Alabamians.

Am I recounting your testimony from this morning correctly that the two you focused on were preserving

the cores of urban areas and preserving just the core of the Black Belt?

A I would say – the way I described it is retaining as much of the Black Belt as possible in majority-black districts.

Q Okay. Now, the Black Belt counties with the exception, perhaps, of Montgomery, do not contain those large urban centers that you were referring to, correct?

A That's right. I would say Montgomery is the clearest exception.

Q Okay. So did you take into account any other communities [663] of interest?

A The only two kinds that I considered were the two that you just cited.

Q Okay. And it's possible there are communities of interest that are relevant to white and black Alabamians alike, correct?

A No question about that. In particular, I think urban cores are relevant to black and white Alabamians alike.

Q Were you able to infer from looking at the 2011 and 2021 maps how the Legislature has applied the community of interest factor in the past?

A Well, as I've said –

MR. NAIFEH: Asked and answered.

JUDGE MARCUS: I think it has been. Sustained.

BY MR. LACOUR:

Q You know, could community of interest consideration explain why Mobile and Baldwin counties were kept together in 2021?

A Did you say could it or did it explain?

Q Could it?

A Could it. Certainly could.

Q Could a community of interest explain why the Wiregrass counties were kept together in the 2021 map?

A It certainly could.

Q Okay. And similar question, could communities of interest considerations explain why Madison and Morgan counties were [664] kept together in the 2021 –

MR. NAIFEH: Objection here to this line of questioning. It's calling for speculation.

JUDGE MARCUS: Okay to answer if she can give it to us.

THE WITNESS: I'm willing to concede that it could, but I was unable to find any systematic description of what communities were considered. I would have indeed been very happy to find such a description.

BY MR. LACOUR:

Q Could you describe the nature of your inquiry into how that guideline might have been applied? I think you said you looked for anything the state had put together. Did you do anything further?

A No, that's all that I did to ascertain whether there had been a state publication or a state collection process.

Q Okay. Now, I think you said earlier it was an express goal of yours to keep the Black Belt counties in majority-black districts to the extent you could. Is that fair?

A Yes.

Q And is it fair to say that you testified this morning that's part of the reason why your compactness scores for CD 1 and CD 2 were lower, correct?

A That's right. Oops. Sorry.

Q Go ahead.

[665] A That's right. The elongated east to west nature of the Black Belt itself is the reason that CD 2 is also elongated in east to west fashion and because that's close to the south of the state, that ends up prescribing elongation for District 1, as well.

Q Okay. So the goal of a majority-black district or rather the goal of two majority-black districts that held most of the counties in the Black Belt took precedence over compactness in District 2?

A No. I can't agree with that. In my understanding of what by Alabamalites should be considered reasonably compact, I used the state's plan as a guide where the least compact district from 10 years ago had a score, a Polsby-Popper score of .13. All of my districts are more compact than that. So I think I was able to maintain reasonable compactness by Alabama standards in my entire plan.

Q Now, none of your plans put all 18 Black Belt counties into one district, correct?

A That's correct. Although if – I'm sorry.

Q No. Go ahead.

A If I remember right, at least one plan puts all 18 Black Belt counties into either District 2 or District 7.

Q I'm not a hundred percent certain that's correct. But we can –

A I am confident –

[666] Q We can turn to the maps?

A Sure. By memory, that's plan D.

Q Okay. And – well, I've got plan D here, so . . . and Milligan Exhibit 3, page 4. So I believe this is also a Black Belt county, correct, where at least some of it is in District 3?

A Indeed, that's right. And that should be Russell, I think.

Q I believe –

A Which –

Q Correct.

A In plan C then. Russell is whole and is included in CD 2 as is the rest of the Black Belt included in either CD 2 or CD 7.

Q Pickens in CD 3 in plan C is CD 4, correct?

A So that is not one of the 18 counties traditionally identified with the Black Belt, although I agree with you that sometimes is included on secondary lists.

Q Going to page 10 of your report. I think you list here among the 18 Black Belt counties, Pickens county, correct?

A That's true that's listed there and not exactly sure which one it is from memory in the map. But I will accept your representation if you're saying that it's excluded in plan C.

Q Our count was that the 18 counties were split among at least three districts in each map, but we can certainly compare [667] and contrast that later.

A Sure. I would be happy to do that later.

Q I want to get back to – so do you recall if there was a reason why all 18 counties were not placed into just two districts instead of three?

A Well, again, with apologies for repetition, one is balancing as a mapmaker. Quite a formidable

number of different priorities, and it's possible that that goal was only attained in 17.5 counties, which is I think what we see in plan B, 17.5 out of 18.

I would submit that that's quite a ways towards the goal of securing representation in majority-black districts throughout the Black Belt. And to that I would only add one could certainly get all 18, but it would come at a cost to other principles as we keep hearing.

Q Would it potentially come at a cost to two majority-Black Voting Age Population districts?

A So now I think you're asking is it possible to get all 18 into Districts 2 and 7 in a plan where those remain majority-black, right?

Q Right.

A I am confident that that's possible. But it would require either more county splits or less compactness and more likely both.

Q Okay. So if your goal was to get most of the Black Belt [668] counties both together and into majority-black districts, would it be fair to say the community of interest you were trying to keep together was not so much the Black Belt as it was just black people more generally?

A No, I don't think so. I don't think anywhere here or ever have I identified black people, full stop, as a community of interest. Communities of interest, in

my understanding, are primarily geographical. And so that would not qualify.

Q Okay. I will take this down.

Okay. Do you recall from the guidelines a statement we were looking at just a moment ago that says contest between comments will be avoided whenever possible?

A That's right. If I recall, that's in that section j. that we discussed.

Q Right. And you didn't address incumbents anywhere in your report, did you?

A That's right. I did not, although I did obtain a list of incumbent addresses while forming the plans. Those were not part of the primary plan drawing. I did look at the number of districts pairing incumbents at the end, although that's not included in the report.

Q Okay. So you know whether the maps place one incumbent in each district or whether they put multiple incumbents in some districts?

A From memory, I think it's the case in all four of my [669] illustrative plans that there were two districts with multiple incumbents, either two incumbents or in some cases even three.

Q Okay. And if Tom Bryan's supplemental report indicated that between four and five incumbents in two different districts –

A That's consistent – sorry.

JUDGE MARCUS: Let him finish the question. Was there a question there, Mr. LaCour? If there was, let me hear it, please.

BY MR. LACOUR:

Q Yeah. So if Tom Bryan's report, Defense Exhibit 4 at page 16 indicated that your plan places four and five incumbents in districts with each other. Do you have any reason to doubt that conclusion?

A No. On the contrary, I agree with that conclusion, that there are either two districts with two incumbents making four overall, or one with two and one with three making five overall.

Q And you said you didn't consider incumbents at the outset of your map drawing process?

A That's correct.

Q Did you consider them at any point in your map drawing process?

A I did look at the end state the finalization stage to see whether it would be possible to reduce the incumbency [670] pairing – not to reduce incumbency itself. And I – I determined that it would be possible, for instance, to keep Representative Sewell in District 7, which she has represented, and I believe that my plan D does so. That was accomplished with little cost to the other principles.

I also satisfied myself that it would be possible to further reduce the incumbency pairing and indeed to reduce it to no pairing at all if we are willing to

sacrifice the higher-ranked principles of compactness, and certainly contiguity, but also if we are willing to sacrifice the county integrity.

Q And there's a lot to be accomplished if you sacrificed contiguity, correct?

A Yes. Although as we heard in the Massachusetts example, not everything.

Q Not everything. You don't think it's possible to draw a geographically – or basically you don't think it's possible to draw a map that is as compact as the maps you have produced as the other criteria to the extent you've applied them also avoids pairing incumbents and results in two majority-black districts?

A I think what I'm comfortable saying is that to reduce pairing of incumbents all the way to zero could still be accomplished with two majority-black districts, I think that it can, but at significant cost to the other principles. If I [671] could add one thing.

Q Please.

A Just to illustrate some of the tradeoffs that that requires, I note in my report that two incumbents actually live not only in the same county, but a few highway exits apart. And so it's clear that to keep those incumbents in different districts, of course one has to split that county. That's just a small illustration that it can literally require sacrifice to the other principles in order to raise the priority on incumbent protection.

Q One second. I apologize.

Okay. Turning to back to core retention. So you looked at the 2011 map and you looked at the 2021 map. Before you got started drawing your own illustrative maps. And you said earlier that it – you could infer that core retention might have been important to the 2021 Legislature. Is that fair?

A In fact I inferred that it was.

Q Okay. I think you testified earlier today that it is impossible to have as high a core preservation as the 2021 map has while having two majority-black districts; is that correct?

A Yes, I believe that to be a simple matter of numbers.

Q Okay. When you were gearing up your algorithm, did you try to preserve some degree of the core of districts in drawing your first few thousand maps or

–

A That was – I'm sorry.

[672] Q Sorry. Go ahead.

A That was not a consideration.

Q Okay. What preservation like some of the other criteria – I mean, it could be a matter of degree. Would you agree?

A Yes, I would.

Q So you could try to preserve 80 percent of the cores of districts or on average try to preserve 80

percent of the cores of districts as one of your goals, correct?

A You could adopt that as a goal. That's the question?

Q Yes.

A Yes, you could.

Q And could your algorithm pull that in as constraints or as a preference in producing maps?

A Yes, I have done that in the past in other states.

Q Okay. But not in this case, correct?

A I did not include that in this case.

Q Core retention is a traditional redistricting principle, correct?

A Well, I would say that like incumbency consideration, it is expressly encouraged in some states and is prohibited in others as a consideration making it somewhat less traditional.

Q But it's not uncommon for a legislature when it sets down to draw a new set of maps to start with the old set of maps, correct?

A That requires me to speculate about process. Although I [673] do think it's a reasonable inference.

Q Okay. In any event, it was inference you made in Alabama for 2021, correct?

A That's right.

Q So you mentioned the State Board of Education map a few times today. And you said that was informative for you in drawing your illustrative plans?

A I considered it. I wouldn't put it high up on the list of considerations, but at some point in the line drawing process I became curious just how that second majority-black district was formed.

Q Uh-huh.

A And so I looked to that map to give me a sense of priorities that the state had in drawing it.

Q Okay. In trying to draw a congressional map in understanding the state's priorities, do you think the way the state drew its 2021 congressional map would be a more informative source, or the way it drew its 2021, eight-member State Board of Education map?

A I treated them both as highly informative.

Q Okay. Do you think one would be more informative than the other?

A That's hard to say. I mean, we are talking about a congressional plan, but if the question that you're seeking to answer is how to make a decision that is not present in the

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[680] Q Okay. So we are getting close to the end, Dr. Duchin. I appreciate your patience with me today.

Returning to something you said near the beginning. You talked about how you used your – the algorithm and algorithmic computer system to generate a large number of maps.

A Yes.

Q And you had certain constraints put in on the front end when you started generating those maps. And I believe you said minimum population deviation, I think, was it plus or minus 1 percent?

A Yes.

Q And contiguity was baked in, as well, correct?

A Correct. The algorithm always enforces contiguity at the VTD level and the population deviation threshold can be specified by the user.

Q Okay. What other constraints did you program in at the outset before you started generating maps?

A The only other constraints – okay. So I doubt that you want to hear specifics, but if you do, I'm happy to expound on any of this, so let me know.

The algorithm in general has a strong preference for compactness that's, as you said, baked in. It doesn't have to be set by the user. The way that districts are formed, it's done in a manner that generally strongly favors compactness, particularly by the cut edges definition that I described [681] earlier.

The only other constraint that was added in that early algorithmic – in fact, not a constraint, but an

algorithmic preference, was to prefer plans in which there would be a second majority-minority district. And I can explain how that was done, if you would like to hear.

Q That would be great.

A Sure. So if you look at the BVAP in all seven districts of a plan, we used what's called an objective function. In other words, a function that sets a goal. And that function credited a point to a plan with a majority-minority district and then took the BVAP in the second district, second highest BVAP, and added it to that. So that, for example, a plan with one district at 52 percent and a second at 47 percent would get a 1.47 score.

Am I making sense so far?

Q As much sense as you will make to me.

A Thanks for saying. I appreciate that.

So – and then the way the algorithm is what's called a mark-off chain, and it randomly proposes a new district configuration and then flips what you can think of as a weighted coin, and so the probability of acceptance was higher if that score was greater. And in that way, an algorithm like that can be shown – there's – my lab has published papers on this topic. An algorithm like that can be shown to do a good [682] job at finding plans that are worthy of consideration in *Gingles I* direction.

Q Okay. But you did not run the algorithm without that strong preference for two majority-black districts, then, did you?

A I did, in fact.

Q Okay. How many maps were generated when you did that?

A In fact, I have a publication where I do that in Alabama. And in that paper, we generated 2 million districting plans for Alabama, which I think we'll agree is quite a few. And we found some with one majority-black district, but never found a second with a majority-black district in 2 million attempts. But, again, that's without taking race into account in any way in the generation process.

Q Okay. So if you programmed into the algorithm traditional districting criteria that did not include race, and you generate 2 million maps, not one of them would have two majority-black districts in it?

A Well, I have to say that I regard minority opportunity to elect as an important traditional principle. So I don't know of a way to talk about the traditional principles that is truly race blind.

Q Would – I think you – would you characterize a map, then, that – assuming for a second that principle of avoiding – put it as minority vote dilution or creating [683] minority opportunity, how would you state the principle? I want to make sure I'm stating it as you would.

A Minority opportunity to elect, I have called it, or minority electoral opportunity.

Q Okay. So if we remove that sort of more race focused minority opportunity to elect factor from the process and you run your 2 million maps, if you were to get a map that had two majority-minority districts that was manmade, that would suggest as an extreme outlier, correct, if it was purporting to apply the same traditional race blind districting principles?

A Just – as someone who uses that term professionally quite a bit, I think that’s a misuse of the term.

Q How so?

A So the term extreme outlier implies a probability distribution in which you’re in the tails. If – I don’t understand any way to construct a probability distribution that reflects the traditional principles and is race blind. As I’ve said, I think it’s part and parcel, in fact, of the nonnegotiable federal level principles. And so I don’t know of a way to talk about the traditional principles as a package that is race blind.

Q Okay. So you offered no opinion in – I’m sorry. Please finish if –

A Well, I only was going to say that I don’t mean to be resisting the question. I am trying to characterize it in [684] language I am comfortable with.

Q Yeah. This is helpful.

So you don’t offer any opinion, then, in this case as to whether you could get – whether it’s possible to

draw two majority-minority districts in Alabama that respect traditional districting criteria in a race blind way?

A It is certainly –

MR. NAIFEH: Objection. That mischaracterizes what she said.

JUDGE MARCUS: Let's finish the question. Before you answer, Dr. Duchin, give us a chance. I am not sure I heard the entire question. The objection came in at the tail end of the question. Let's ask it crisply and then we will hear the objection.

MR. LACOUR: Thank you, Your Honor.

BY MR. LACOUR:

Q So Dr. Duchin, you said before that you don't really know how to take into account traditional districting criteria without also including that more race focused criteria of ensuring minority representation, correct?

A I do know how to run algorithms that are race blind, but I don't know how to think of those as answering to the traditional principles. They equally – just to illustrate, I can also run algorithms that don't equalize populations and let some districts get ten times as big as others. But then I [685] think we've departed from the traditional principles.

Q Okay. So you offer no opinion, then, in this case, though, as to whether it's possible to draw according to all traditional redistricting criteria minus that

one – the race focus criteria of two majority-black districts in the state of Alabama?

A That question I can certainly answer.

It is possible, because the world of possibility includes my demonstrative maps, which could be arrived at through a random process. So it is certainly possible.

Q Okay. But when you applied a random process in that study you referenced earlier and you drew 2 million maps, not one of them came back looking anything like one of the four illustrative maps, at least when it comes to Black Voting Age Population in two districts?

A Well, I can't answer whether one of them had a majority-black district and a second that was 49.999, in which case it could closely resemble one of the ones that I drew. But I can say that my understanding is that race consciousness is expressly permitted in order to achieve minority electoral opportunity, and in particular, in order to draw majority-black districts, stands to reason that one must consider race. And I think the study that I referenced showing that it is hard to draw two majority-black districts by accident shows the importance of doing so on purpose.

[686] Q So – okay. Sorry. One moment, please. Are you familiar with Dr. Imai – I'm – try to say his first name – I know I'll get it wrong. Dr. Kosuke Imai?

THE WITNESS: It's Kosuke and certainly his – he and I have talked for many years about the development – or for districting algorithms.

BY MR. LACOUR:

Q Okay. He also engages in extreme outlier analysis, correct?

A He does.

MR. NAIFEH: I am going to object. This is outside the scope of direct and outside the scope of her opinions in this case.

JUDGE MARCUS: Are you asking her to comment on Dr. Imai's opinion?

MR. LACOUR: Your Honor, she said a moment ago that she would reject the –

JUDGE MARCUS: I'm asking you whether you are asking her to comment about Dr. Imai's opinions.

MR. LACOUR: Not to question his opinions, but to see if her – his opinions might affect her opinion of what is possible when it comes to drawing majority-black districts in Alabama.

JUDGE MARCUS: You might ask if she is familiar with his opinion in this case.

[687] BY MR. LACOUR:

Q Dr. Duchin, you are familiar with Dr. Imai's opinions in this case?

A Absolutely not. In fact, I only very recently learned that he was a witness in this case at all.

Q Okay. Would it surprise you if I told you that he drew 30,000 sample maps?

MR. NAIFEH: Objection.

JUDGE MARCUS: Let him finish the question, Mr. Naifeh. Please.

BY MR. LACOUR:

Q Would it surprise you if I told you that he ran an algorithm that produced 30,000 sample congressional maps in the state that adhered to certain traditional districting criteria, including incumbency which I know your maps did not, and that of the 30,000 maps, not one of them came back with two majority-black districts?

JUDGE MARCUS: The objection is sustained.

MR. LACOUR: Okay. Let me just have one moment to confer with my colleagues.

JUDGE MARCUS: Sure. Take your time.

(Mr. LaCour confers with co-counsel.)

BY MR. LACOUR:

Q Two quick final questions, and then I can let you go.

So if you were to learn that Alabama split Mobile County

* * *

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[788] CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Christina K. Decker
Christina K. Decker, RMR, CRR
Federal Official Court Reporter
ACCR#: 255

01-06-2022
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BOBBY SINGLETON, et al., *
Plaintiffs, *
vs. * 2:21-cv-1291-AMM
JOHN MERRILL, in his *
official capacity as Alabama *
Secretary of State, et al., *
Defendants. *
* * * * * * * * * * * * * * * *
EVAN MILLIGAN, et al., *
Plaintiffs, *
vs. *
JOHN MERRILL, in his * 2:21-cv-1530-AMM
official capacity as Alabama *
Secretary of State, et al., *
Defendants. *
* * * * * * * * * * * * * * * *
MARCUS CASTER, et al., *
Plaintiffs, *
vs. *
JOHN MERRILL, in his * 2:21-cv-1536-AMM
official capacity as Alabama *
Secretary of State, et al., *
Defendants. *
* * * * * * * * * * * * * * * *

TRANSCRIPT OF PRELIMINARY INJUNCTION
HEARING VIA ZOOM CONFERENCE
VOLUME IV
BEFORE THE HONORABLE ANNA M. MANASCO,
THE HONORABLE TERRY F. MOORER,
THE HONORABLE STANLEY MARCUS

Proceedings recorded by
OFFICIAL COURT REPORTER, Qualified pursuant
to 28 U.S.C. 753(a) & Guide to Judiciary Policies and
Procedures Vol. VI, Chapter III, D.2. Transcript
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[853] comparable districts in the Hatcher plan, you may see a couple of instances there where the Hatcher plan is not as low, just because it does not have boundaries that exactly follow those physical features. But in aggregate, across the board, every measure that you would look at would say the Alabama plan is superior, sometimes significantly so to the Hatcher plan.

Q Got it. But the Court, if it wants to look at Table 5.4 and 5.5 and compare the scores for each district in the Hatcher plan and the state's plan; is that right?

A Right.

Q Okay. Let's look at some of the maps you prepared for the Hatcher plan, Mr. Bryan. I want to turn now to Page 44 of your report, Page 44 according to the filing information on the top of the page.

What do we see in this map, Mr. Bryan? This Map Appendix 5?

A Sure.

Q Tell us what you are showing us in this map.

A Sure. So this is a – this is consistent with some of the other maps that we've produced for different plans. It's an outline of the Hatcher plan, and it shows the percent black alone by – let's see – this is actually mislabeled. This is a black alone by county map. So I would disregard the label within the map and refer to the map appendix, the title of the map. This is black alone by VTD – by county.

[854] Q Thank you.

Now, this District 2 – you see my cursor moving, I take it, on the screen?

A Yes, I see.

Q District 2, which takes part of Mobile County and then goes east, and District 7 which includes this finger into Jefferson County, those are the two majority-black districts in the Hatcher plan, are they not?

A That's correct.

Q Is there any county in the state that is more than 40 percent black population that is not included in either District 7 or District 2 in the Hatcher plan?

A There's only two pieces that I see. There's, again, in Jefferson, there's a little portion of the district that goes outside of 7. And then, I think similarly, you move your cursor down and over to the right, that

county with 79 percent goes just over the edge. And that's slightly split by district, as well.

But other than that, yeah. And 43 right there. Other than that, there's no other 40 percent or greater wholly contained counties in any other districts.

Q Let's move to the next map, Map Appendix 6. What are you showing us here?

A Yeah. So this would be the Voting Age Population by county overlaid with the Hatcher plan, again showing the high [855] concentrations of population in Jefferson County and Mobile and Baldwin counties.

Q Where does it appear, according to this map, that District 7 is getting most of the people that populate this district? Most of the people, regardless of race.

A Yeah. The biggest piece would be coming from the area in Jefferson County.

Q And where would District 2 be getting most of its total population?

A It's a little less clear here because you've – it is intersecting the Mobile and the Baldwin counties to the southwest. But there is another also another populous county in north central – 177,427, right in there. So that's a corner, just given that we have 700-and-some thousand population, that county would be contributing disproportionately to the overall plan.

Q Yeah. This is Montgomery County, correct?

A Yeah. Correct. It's not labeled on my map, but, yeah, I believe that's correct.

Q Let's look at Map Appendix 7 on the next page.

A Sure.

Q What do we see here, Mr. Bryan?

A Yeah. So this is the – this is the plan that shows the percent black alone by the VTDs overlaid with the Hatcher plan.

Q Okay. What, if anything, is indicative to you of the map [856] drawers' intention when you look at the splits of, say, Jefferson County, here between 7 and 6, and Mobile County between Districts 2 and 1?

A Sure. I'll be careful to put myself in the mindset or speak for the intention of the map drawer. I will speak more so to the appearance or the outcome of the map, if that is all right.

Q Assume that's what I asked. Is this any appearance here that jumps out to as an a demographer?

A Yes. I would be more precise if I focus on that than intent.

As you follow the new District 2 starting kind of over on the eastern edge of the state near the border, near where Columbus is, and you see that the northern edge of District 2 starts tracing from east to west across the central part of the state, you can see easily that that line almost precisely exactly follows the contours of the very highest black population VTDs – can

literally go from one to the next and look on the northern edge of that line and see what I call the yellow, red, you know, 10 percent, 20 percent black, and then you go below that line and you immediately see a 60 percent or more black. It is literally like the dividing line of black and much less black population.

As you follow that boundary around to the central part of the state through the Black Belt, District 2 turns south and [857] goes down towards Mobile and Baldwin counties. You can see that the map – and the map that District 2, the boundaries of it go down around Mobile. I think we have another map that may show it in more detail. But we can illustrate that in this plan the boundaries of District 2 went around Mobile, not following a city boundary or any other administrative boundaries. It just followed the edge of where black population was and was not.

Similarly, in District 7, you can see that it captures large portions, very carefully captures large portions of black populations. And as you go into Birmingham, Jefferson County, you can see that it nearly perfectly outer bounds only the exact black population VTDs in the northeast corner of Birmingham.

Q Why don't we go ahead and look at some of the close-up maps that you prepared.

Let's look at Map Appendix 9?

A Right.

Q What do we see here, Mr. Bryan?

A Sure. So the dark line, if you can see carefully enough it's kind of dark black and a purple line. That's the existing district boundaries.

The –

Q Let me interrupt you. By existing, do you mean the 2011 plan?

[858] A Yes.

Q Okay.

A Thank you.

The existing 2011 district plan. And what I have done here is I have overlaid, again, with a blue outline where the Hatcher plan boundaries are. And if you look, what the Hatcher plan does, is it kind of follows closely along where the existing districts were, but then I have shown with little blue dots here where the Hatcher plan did what we call an outer bound. That is it went beyond the existing districts and grabbed just the precincts that had the highest concentrations of black population.

You can see that there are plenty of VTDs surrounding Birmingham that are colored yellow and orange, reflecting lower black population concentrations. And the plan just really prioritized – appears to have prioritized making sure that it got the highest black concentration VTDs into the plan.

Q Thank you.

Let's look at the next map, Map Appendix 10.

A Sure.

Q What are you showing us with this map, Mr. Bryan?

A Yeah. So one of the – in just looking at the data for the new Alabama plan, what I suspected we were going to find is that there were some VTDs – I did not know where, but there would be some VTDs where there was black population that would

* * *

[1119] CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Christina K. Decker
Christina K. Decker, RMR, CRR
Federal Official Court Reporter
ACCR#: 255

01-07-2022
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BOBBY SINGLETON, et al., *
Plaintiffs, *
vs. * 2:21-cv-1291-AMM
JOHN MERRILL, in his *
official capacity as Alabama *
Secretary of State, et al., *
Defendants. *
* * * * * * * * * * * * * * *
EVAN MILLIGAN, et al., *
Plaintiffs, *
vs. *
JOHN MERRILL, in his *
official capacity as Alabama *
Secretary of State, et al., *
Defendants. *
* * * * * * * * * * * * * * *
MARCUS CASTER, et al., *
Plaintiffs, *
vs. *
JOHN MERRILL, in his *
official capacity as Alabama *
Secretary of State, et al., *
Defendants. *
* * * * * * * * * * * * * * *

TRANSCRIPT OF PRELIMINARY INJUNCTION
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BEFORE THE HONORABLE ANNA M. MANASCO,
THE HONORABLE TERRY F. MOORER,
THE HONORABLE STANLEY MARCUS

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[1655] **PROCEEDINGS**

(In open court.)

JUDGE MARCUS: Are the parties ready to proceed?

MR. DAVIS: Defense is ready, and Mr. Byrne the next witness is here and ready, Judge.

JUDGE MARCUS: Okay. Caster plaintiffs are ready?

MS. KHANNA: Yes, Your Honor.

JUDGE MARCUS: And the Milligan and Singleton plaintiffs?

MR. BLACKSHER: Singleton are.

MS. WELBORN: Milligan are, as well, thank you.

JUDGE MARCUS: We are going to turn now to your next witness, Mr. Davis.

MR. DAVIS: Thank you, Judge. The defense calls Mr. Bradley Byrne.

BRADLEY BYRNE,

having been first duly sworn, was examined and testified as follows:

JUDGE MARCUS: Thanks very much. And if you would be kind enough to state your name for the record.

THE WITNESS: My name is Bradley Byrne, B-R-A-D-L-E-Y, B-Y-R-N-E.

JUDGE MARCUS: Thank you very much. And with that, Mr. Davis, you may proceed.

MR. DAVIS: Thank you, Judge.

* * *

[1665] sixth generation ship builders. Making ships is not like any other manufacturing process because they're so darn big. It's just a lot more to it than making a car, or even making the airplanes that Airbus makes here.

So we – that ship building for the Navy here is a big deal.

Q In the years when you were representing this area in Congress, Mr. Byrne, were there any particular issues that you would focus on?

A Sure. When you are a Congressman, you're the primary representative for the people in your district in Washington, D.C.

So there were a myriad of things that were particular to this district that I had to focus on. The shipyard, for example, very critical that we make sure those ships are authorized and appropriated year after year after year. There's nothing automatic about that. There's a fight over that every year.

But it may sound mundane. We had a huge issue here in involving the Gulf Red Snapper, which is the number one fish people like to catch out in the Gulf of Mexico. We have a huge industry in Orange Beach built up around charter boats, people that own their own boats. Think about it. It is not just the fact of the boat, it's you have to buy fuel for the boat, you have to buy ice for the boat, you have to buy bait for the [1666] boat, you have to buy beer to go out and have fun in the summer time. It's a huge industry. And we have a real problem with those seasons being artificially shortened, and we had to go work on trying to get those seasons back to a reasonable level. For friends of mine that wanted to go fishing on Saturday, it was for that industry. It was important.

We have a program in the federal government called GOMESA. It is an acronym. But basically, it provides a certain percentage of what the federal

government gets in off shore gas leases and oil leases that go to the states that border the Gulf of Mexico. That's to help them deal with what could be the very negative effect from that like with the BP oil spill that we had back in 2010. So I was constantly working on that and similar programs.

So I actually formed a caucus in Congress called the I-10 Caucus because those of us that represented districts in the Gulf Coast had sort of unique problems that we would actually work on together because those same interests weren't shared with our colleagues and our state delegations up in the upper parts of our states. So we would work together on things like that.

And then there would be just the stuff that, you know, every industry faces when you deal with federal government regulations. Ship building has all sorts of interesting issues with the Coast Guard, et cetera. So, yeah, I mean, I had to [1667] work on those. And really had to become an expert on those issues along with my staff.

Q Obviously, a longer snapper season would benefit the people who enjoy going out in the Gulf and fishing. Does it have any benefit to other residents of the First District having a healthy fishing industry?

A Okay. That's an industry around it. There are charter boat fleets, people that work on charter boats. There are people that run marinas. There are people that sell fuel. There are people that sell ice. There are people that sell bait. There are people that, you know,

provide condos and hotel rooms that people stay in when they go fishing.

I mean, I remember when I was first elected and I had a meeting with the people in Orange Beach that were in that industry, and the room was just crammed full of people. I never really thought of it that clearly before just how many people were touched by the fact that we do or do not have a good snapper season. And it was a major motivation to make sure that we got that problem solved because it touched so many different lives and touched so many different jobs.

Q Would issues that you worked on such as is the snapper season or a healthy port or a healthy ship building industry, would they help both the black and the white residents of the First District?

A Oh, yeah. I mean, people down here, we have people of all [1668] races that are working in all of these industries. And it's a major source to get good high paying jobs. So it's a benefit to everybody that we do that.

Q Uh-huh. Are you familiar with the Wiregrass region in the Second District?

A I am. I told you earlier that I was a chancellor of post-secondary education for the state of Alabama. And we had three or four colleges in the Wiregrass region. We had a number of vacancies in those colleges, so I had to go through presidential searches. When you do a presidential search for a community college, you have to involve the community. You have

to get involved with the community. You have to understand that community.

So, for example, Lurleen B. Wallace Community College in Andalusia, Alabama, that's Covington County, I spent a lot of time in Andalusia because we had to build a vacancy there. So, yes, I have spent a lot of time in the Wiregrass of Alabama because of that position.

Q Tell me how the interest of the Wiregrass would compare to the interest of the counties that are in the First Congressional District.

A Well, what I described to you before is in the First Congressional District southwest Alabama, something's built around the water, okay? The Wiregrass is built around a couple of things. Fort Rucker, which an Army helicopter training base [1669] there in Ozark is a big part of the Wiregrass. Troy State University is a huge part of the Wiregrass.

People in the Wiregrass sort of revolve around Dothan down at the southern end and Montgomery at the northern end. And they have agricultural interests that are different from the agricultural interests that will be out here in southwest Alabama. They don't have a nursery industry like we have here. We have major wholesale nursery businesses here. They don't have major watermelon crops. They don't have major pecan crops. They're more built in to peanuts and cotton and cattle.

So they face, for example, during – during in Andalusia, Alabama, you face more towards Troy or Ozark or Dothan. You don't face down here in southwest Alabama. In addition, it's kind of hard to get from Mobile to the Wiregrass. We don't have really good highway connections over there. So it's not easy for people from there to come here or for people from here to go there.

So they sort of face to the southeastern part of the state. We face to the southwestern part of the state.

Q If you were representing the Second District, would you focus on the same issues that you are focused on when representing the First?

A No, sir. For example, I was on the Armed Services Committee, and with the Navy shipyard, I am going to be focused on Navy stuff.

[1670] If I represented the Second Congressional District, I would be focused on the Army and particularly Army helicopters. That's what they do at Fort Rucker.

In this district, I was focused for higher education reasons on the University of South Alabama. If I represented the Second District, I would be focused on Troy. Now, Troy has a different mission from the University of South Alabama. They have an international presence. So working with Troy would be very different from working for the University of South Alabama. Troy doesn't have a medical school, but it has a whole lot of other stuff that's pretty darn important. So there

would – and the agricultural interests I just described are very different.

So I would think being the congressman from the Second District requires a different level of expertise and level of expertise that I feel like I had to have to represent this district.

Q I want to share another screen now, Mr. Byrne. And this is Milligan Exhibit 3, page 7 of that exhibit.

These are some proposed congressional maps that one of the plaintiffs' experts presented, I will represent to you, Mr. Byrne.

Review just say these – here's Plan A and B, and then I will scroll down to Plan C and Plan D, as well.

Focus on any of those, and tell us what's your reaction [1671] is. Do you see any issues with representing these districts?

A Yes. If you look at Plan A and Plan B, you see it takes in part of Mobile County, all of Baldwin County, and then goes east into the Wiregrass legion. So you would essential have to become an expert on two different regions altogether, two different communities of interest. I know that's important for those proceedings.

Then if you look at that district just above it, that district is essentially part of the Black Belt and part of southwest Alabama. So the person representing that district would essentially have to have two very dramatically different sets of expertise. I think it would be

very difficult to be the congressman for either of those districts not just the fact you would have this vast geographic area you would have to cover, but you would be covering two very different communities of interest.

Q Uh-huh. Why would it make it more difficult to represent a district if it encompassed different communities of interest?

A Well, for example, if you represented that blue district at the very bottom, you would have to be an expert on things involving Navy shipyards and Army helicopter bases. You would have to be an expert when it comes to agricultural issues like everything from wholesale nurseries, watermelons, pecans, to peanuts, cattle production, and cotton production. You would have to be focused on two major universities that have very [1672] different missions. You would have to be focused on Dothan. You would have to be focused on Andalusia. You would have to be focused on Brewton, Mobile, and then all of Baldwin County, which is the fastest growing county in the state.

So I am not saying you couldn't do it. It would be extremely difficult to do it, and you would find yourself somewhat diffused in your ability to be an effective advocate for that region.

Q What do you mean by diffused?

A Well, there's only so many hours in the day for a congressman and the staff that that congressman has. And there are hundreds if not thousands of issues in Washington. And you have got to figure out what

your focus is going to be on. And focus is very important for a member of Congress because there's just not enough bandwidth, and there's only 435 congressmen, and you are one of them.

So you really have to figure out where am I going to put my time? Where am I going to put the resources of my staff? What fights am I going to fight. If you are fighting a whole bunch of different fights because you have to, because you have got that many interests in your district, you are not going to be effective on each one of those. The more you can sort of focus your energies, the more effective you will be.

I will give you an example. Everybody in the House of Representatives and the staff and the leadership, et cetera [1673] knew that I was interested in a bridge across Mobile Bay, fixing the snapper problem, and gaining the ships authorizing and appropriated for the shipyard here. Literally, I had the Speaker come up to me on the floor and say, we get it. It's that bridge, it's those ships, and it's those fish. Now, when they know that, they know they have got to make me happy on that to get my votes. If they don't make me happy on that, they are not going to get my votes.

Now, if I say I have 20 different things I want you to make me happy on, they will say, look, I am not going to make you happy on 20 things. You tell me what your priorities are. We will help you get those things done, and then you will be a part of the team. That's how it works. Anybody that tries to be like out there fighting on every fight tends not to win any fight.

Q Let's say you represented – I guess I should show you the maps again. If you represented a blue district, do you see any difficulty in just getting around and visiting your constituents?

A Yeah. It's a long way from Mobile to Dothan. Actually, the way you get from Mobile to Dothan is that you get on Interstate 10, you drive east through the Florida panhandle, and then you get just north of Panama City you turn north. So it's about a three to three-and-a-half hour drive from Mobile to Dothan.

[1674] And north of there to Henry County, that's a county just north of Houston County, it's even further than that. And so in order to represent the people in Abbeville who deserve good representation, even if you just visited there for an hour, you would spend three-and-a-half, maybe four hours just to get there and that much going back, so it's a long haul.

And the interests as I said of that southeastern part of the state are very different than the interests in the southwestern part of the state.

So when you finish with having your meetings in an area like that, go back to Washington, you have to decide, all right, what I am going to focus on? What are the priorities for this sort of sprawling district with all these different interests?

And somebody is going to lose out. That's just the way it is. There's only so much bandwidth for a congressman, and that person has to decide what am I

going to focus on? Am I going to help the shipyard in Mobile, or am I going to help Fort Rucker?

Q Where do you think a congressman or congresswoman who represented the blue district would want to have local offices?

A Well, you clearly want to have your main office Mobile, but you want to have as pretty significant office as you can afford in Dothan. You are only allotted so much money as a congressman for your office, staff, and your office rent. So [1675] you have got to spread that over Mobile and Dothan. And Baldwin County is the fastest growing county in the state. You have to have a presence in Baldwin County for a lot of different reasons.

Then I guess you try to find some way to put something in Andalusia. That's kind of more centrally located geographically. But as I said, and I can say it's really hard to get from here to Andalusia. Andalusia is a pretty hefty drive from here. Not as far as Dothan, but it's still a hefty drive because there's no good highway to get there.

Q Look at this yellow district or tan, the one above the blue district.

Let's say there was a primary election in that district, and someone was running to be the Democratic candidate, and that someone was from Mobile. There was another person running in the primary from Montgomery. Do you have any thoughts on who might have a stronger base of support geographically?

A I would think that if you were from Montgomery, you would have a stronger chance than if you're representing that part that's in Mobile.

The Black Belt – what those counties primarily look like to me, the Black Belt is kind of its own thing. It's got very rural, very agricultural. And they look more to Montgomery than they look to Mobile for sure. So I would think somebody from Montgomery would have a better shot at that district than [1676] somebody from Mobile.

Q Do you think it possible, Mr. Byrne, if you had a map in Plan A or Plan B that you could have, say, a congressman for the blue district from Dothan or Andalusia and a congressman for the yellow district from Montgomery so that you had no one in Congress from the Mobile region?

A That could happen, yeah. It's kind of hard to know exactly what parts of Mobile County are being taken with those two plans. But if you dilute the vote in Mobile County, that obviously is going to make the vote of the rest of that district – those two districts more important. So, yeah, you could have a congressman from Dothan under both of those plans and a congressman from Montgomery and not a congressman from Mobile, which would be a tragedy for the people down here.

Q Why would it be a tragedy for the people down there?

A I'm not saying somebody from Dothan or Montgomery wouldn't care about this area. But as I said before, you wouldn't have somebody that's focused, focused on the port, focused on the shipyard, focused on our fishery in the Gulf of Mexico, focused on the nursery issues we have here. They just – they're just not enough bandwidth to be as focused as I was able to be focused. I could walk in a room and talk about any of those issues and master it. If I had to represent those other areas, as well, or somebody from the other areas had to represent Mobile, I just don't think that you could master it.

[1677] Q Do Mobile and Montgomery ever compete each other, in terms of trying to recruit businesses, for example?

A Not that I know of. Their economic development plan, their industrial plan is very different from ours. Montgomery, for all the right reasons, has really focused on two things – automotive, obviously with the Hyundai plant there and all the suppliers of the Hyundai plant, but also because of their Air Force presence, they really focus on how they can magnify Maxwell Air Force Base and things that are a part of that.

I think they have made a very smart decision to do that, by the way, but that's a different economic plan than what we have done here. So we're as much trying to help them because of the port. So as anything else, I don't really think we believe ourselves that we're competing with them.

Q Would you have any concerns with the congressional map that divided the Mobile region along racial lines?

A Yes.

Q What would those be?

A Well, when you are a Congressman, you should be representing everybody and thinking about how I do X is that going to affect everybody in my district? You shouldn't be thinking about, I am going to do this because it helps black people, or I'm going to do this because it helps white people. I am going to do this because it helps everybody. And if you help everybody, everybody rises. That's what you want.

[1678] Mobile is a little bit different from the rest of the state. We do not have the same history during the Civil Rights movement that Selma, Montgomery, Birmingham did. We had a mayor here named Joe Lang who worked with a Civil Rights leader down here named John LeFlore. And so we didn't have some of the violence, the extent of the violence that you saw in the other parts of the state. We tried to work through our issues because we thought it was more important for us to work through those issues and work together to try to figure out a way to live together harmoniously. Were we perfect about it? No, we did not. But we didn't have the problems you saw in the rest of the state because we at least made the effort to work together.

Q When you said that you worked – that you served on the state school board, correct?

A Yeah.

Q I want to share a map now which is Defendants' Exhibit 26. This is the 2001 map, Mr. Byrne. I know – I think you were in the State Senate then, weren't you?

A In 2001, I was still on the state school board.

Q Okay. So which district did you represent in the state school board?

A District number 1.

Q Thank you. Did you ever get calls from people in, say District 5 when you were on the school board?

[1679] A I did. There was some people in Monroe County, I remember, and maybe Clarke County who thought I was their state school board member, and they would call me, and I would always call the member for that district when they did and ask him or her because it changed if they wanted me to help those people, and they would say, please. And I would go up there and talk with them and explain to them I was not their school board.

Q Now, I want to share a newer map. This is from Caster Exhibit 1, which for the record, was Mr. Cooper's report. This is page 19 of that report. And I will represent to you, Mr. Byrne, this is the new state school board map that was passed by the Legislature this cycle just a couple of months ago.

What thoughts if any do you have about this map, in particular, the way the blue district includes part of Mobile and Baldwin County is constructed?

A Well, I testified before the Legislature Redistricting Committee that I felt like Mobile and Baldwin County should be kept whole and contiguous. So to the extent that this map includes a district that comes from Montgomery all the way into Mobile County, I didn't much like it.

Q Why did you not like it?

A Because Mobile County school system is the largest school system in the state. And it has unique issues because it's the largest in the state. And I felt like we needed a school board [1680] member who was focused on Mobile County as well as the other counties. I had Baldwin and Escambia as well. But there were so many issues with the Mobile County school system, a lot of my time was spent focused on that. And if you break it up into two different people, you don't really have that level of focus.

I'm not saying that the people that represent those two districts aren't working as hard as they can. I'm sure they are. But it's very difficult to be focused on the Mobile County school system if you have got almost all the Black Belt, which that district up in the northern part is and a big chunk of the Wiregrass, which the lower part of the – the lower district is.

Q Someone who has served both in Congress and on the state school board, how do the roles of those two offices compare to each other, Mr. Byrne?

A They're very different. You're on the state school board, you are focused on educational issues. That's it.

Now, there are some work force development issues that go with that, et cetera. But that's pretty much it. You are just focused on educational issues. When you are in the United States Congress, you are focused on a large number of issues. I mean, it's almost everything comes within the purview of the United States Congress from foreign policy, defense policy, health care, to internal security, and education, as well. I [1681] was on the Education and Labor Committee in the House of Representatives. And one of the problems I had as a congressman is that people expected you to be knowledgeable on so many different things.

Now, at least you have got a staff in Congress. When I was on the state school board, I had no staff. I had to rely upon the staff of the State Department of Education, and they had other things to do.

So it was difficult to me to be on the state school board. But at least I could just focus on one set of issues and try to master them.

And so it was very different being in both of those roles. But I enjoyed both of those roles.

Q Considering the different roles between the school board and the congressman, even if you

assumed it made sense to split Mobile County in a school board map, does that mean it would make sense to do so in a congressional map?

A No. It would not make sense. At least on the school board, you are focused on one set of issues. So if I'm from Montgomery and I have got half of Mobile County from Mobile and I have part of the Wiregrass, at least, I have got a geographically diverse area. At least, I'm really only focused on a very set, defined set of issues.

Now, they are very important issues. Don't get me wrong. But at least I could focus on those issues and try to make sure [1682] as I go from county to county that I am applying what I know on these issues to each one of those counties as they are very different.

Q When you campaigned for Congress in the different elections, Mr. Byrne, what parts of your district would you campaign in?

A All of them. I had a – go ahead.

Q Would you campaign in areas that were both more – would you campaign in neighborhoods or areas that had a large African-American community?

A Oh, yeah. You can't run for Congress in this district – I will just make sure – to be clear – in this district without touching every part of it. And I made a concerted effort to go everywhere. In fact, if you look at my schedule, I spent a disproportionate amount of my time in the more rural areas than I did in more populated areas, because if you want to go up to

Monroeville, you might as well spend some time in Monroe County.

There are parts of Monroe County that are almost completely African-American. There's a little town in north Monroe county called Beatrice that's 50/50. I had a town ball in Beatrice. Someone said, why in the world would you bother spending time in Beatrice because it's so small? I said they deserve to be represented, too. So I went to all parts of my district.

[1683] Prichard probably didn't give me 5 percent of the vote in my elections. I probably lost there by a huge margin. But I would go and have town hall meetings and campaign in Prichard because I believed the people in Prichard deserve to have a good congressman.

Q When you ran for Congress, Mr. Byrne, did you run as a candidate of any political party?

A Yes. I was a Republican.

Q Why are you a Republican, Mr. Byrne?

A Because the Republican Party is closer to the conservative principles that I believe in than the Democratic Party is. I started out as a Democrat, but I felt like by 1997 I guess is when I switched parties, the Democratic Party had migrated away from what were my principles. Not putting down the Democratic Party if people are Democrats. I have friends who are Democrats and work with a lot of Democrats, but I just felt like the Republican Party is more closely aligned with where I stood on issues and principles.

Q Did you work with Democrats when you were in Congress?

A Oh, yes. All the time. I will give you two examples. I served on the Armed Services Committee. Every year, the only bill the Armed Services Committee works on is the National Defense Authorization, which we have passed out of the Congress every year since John Kennedy was president. Those bills are always bipartisan 100 years ago percent of the time. We work [1684] – from the very beginning of the years, we work on that bill. We consciously work together to make sure that bill, the bill that authorizes the defense of this country is something that we can all vote for.

So we work at being bipartisan, very much so.

The other example I give you is this: Shortly after President Trump was elected, this “Me-Too” movement came out. And we discovered that we have “Me-Too” problems in United States Congress. But we also discovered that members of the United States Congress weren’t subject to the same processes that the private sector was subject to under Title VII of the 1964 Civil Rights Act.

Now, I spent a career as a labor employment attorney telling small, medium-sized businesses in Alabama what they had to do to comply with that law. And here in Congress, the body that passed that law was not holding itself under the same set of accountability processes.

So I worked with a very liberal Democrat congresswoman from California, Jackie Speier, and we put together a bill that made Congress be as accountable, even more accountable than we hold people in the private sector, and that bill that Jackie and I put together passed the United States House unanimously, passed the United States Senate unanimously, and is a law of the United States now. And those are just two examples.

I worked all the time in a bipartisan manner, because I [1685] firmly believe that the best legislation in Washington is bipartisan legislation. The hardest legislation to pass in Washington is partisan legislation. And it's always a problem, always.

So I enjoyed working the bipartisan fashion. I know you look up there now and think, they're completely divided. They can't get along. And there are problems. Don't get me wrong. But there are still people up there, former colleagues of mine on both sides of the aisle that understand what I say is true, and they're still trying to work together to make things happen and happen in the right way.

Q When you served on the delegation with Congresswoman Sewell for the Seventh District, did you have the opportunity to work with her on any issues?

A Oh, all the time. All the time. We shared Clarke County. We actually had joint town halls together.

If she had an issue that affected her district, you know uniquely, she would call on the other members of the delegation to help her, and we always did, 100 years ago percent of the time. And she always helped us. We all worked together. It wasn't like it was unique to her.

So Terry was a part of a group called Faith and Politics. I assume she is still a part of it. That's the group that brings the pilgrimage to Alabama every year around the anniversary of the Edmund Pettus Bridge March from 1965. She [1686] wanted to make sure that when that group came here to Alabama, which would bring couple hundred people, people from Congress, people from business and industry, people from foundations, she wanted to make sure that we were all working together, that they saw Alabama, the Alabama delegation working together.

So I always participated in that pilgrimage with her. Usually on Saturday mornings when she did her program either at Brown Chapel in Selma or the Dexter Avenue Baptist Church in Montgomery, she would ask me to be sort of her sidekick for it, so that we could get up and tell the people from all the other parties of America here's a Democrat and Republican, black woman and white man working together on issues that matter to the people of Alabama, in particular, matters that revolve around Civil Rights.

And I was always honored that she felt comfortable enough to ask me to do that. And I can tell you, you can sit in that room with some of the people in that

room like John Lewis who we lost last year, and you realize what people in this state went through to get us the quality of life we have got today – to get to today. I feel like a little bitty nothing compared to people like that. But it was an honor always to be with Terry and to work with her on – whether it's the pilgrimage or other things that were important to our district.

Q When you were in Congress, Mr. Byrne, were there any issues you worked on to devote your time and your political [1687] capital towards that you thought and expected to have a particular benefit to your African-American constituents?

A Just about everything. If I am doing something that's going to benefit the economy in southwest Alabama, it's going to benefit African-Americans in my district, of course, it is. If you go to the various businesses in this area, and I traveled and met with workers in every one of these industries. It was always black and white. That's the nature of our work force down here. I mean, whether you are at a chemical plant, steel plant, ship building plant, airplane, you are going to have a mixed group of people.

So every time I was doing something for the economy. But I particularly felt like I was helping them every time we worked on education issues. And this goes back to my state school board days. I think the number one Civil Rights issue in Alabama today is the fact that we don't give a quality education to black people like we do the white people. And I really feel strongly about that. We are not going to have the sort

of gains and advances and progress we need in this state until we make more improvements to our education system. That's true across the country, but I am more focused on Alabama.

Q Have you spent any time working with HBCUs, Mr. Byrne?

A Yes, sir. HBCUs are historically black colleges and universities. We had several of them in the two-year college [1688] system in Alabama include Bishop State here in Mobile. So when I was on the state school board, I worked with them. When I was chancellor of post-secondary education I worked with them. And by the way, including Tuskegee, and then when I got to Congress, a congresswoman from North Carolina named Alma Adams asked me to be a co-chair with her of the HBCU Congressional Causas. So for five years I guess it was, I was the co-chair of the HBCU Congressional Caucus.

Q Did you spend time working on community health centers?

A Oh, yes. We have several community health centers here in the district. I've gotten to know them pretty well. I am very impressed with the quality of health care that they provide to their patients. And I was a strong advocate for them and continue to be a strong advocate for them because I think that they provide quality health care close near where people live, so it's community plan, and it's the best way I think to get primary health care to people in those

communities. So I am a strong supporter of community health center.

Q Back to your co-chairmanship on the HBCU caucus, I am not suggesting this was the reason you did it, but did you receive any recognition for your service in that area?

A I did. The Thurgood Marshall Fund gave me an award three years. Probably one of the awards that I am the most proud of. Thurgood Marshall Fund works to provide funding, private funding to HBCUs across America. And I had no idea [1689] they were going to give me an award, and it just knocked me out when they did. I remain in contact with them. I still continue to work with them even though I am not in Congress because I am a huge believer in HBCUs, and I think what the Thurgood Marshall Fund is doing and the United Negro College Fund, both of them together are doing great work for those colleges, and I think they are important to America.

Q Just a few more questions, Mr. Byrne. And I will remind you. We want to make sure the Court understands your testimony that Ms. Decker can take it down. We will try to slow down just a little. I want to – when you were in Congress, did you consider yourself to be the representative of both Republicans and Democrats in your district?

A Yes.

Q Did you consider yourself to be the representative of both the white and African-American constituents in your district?

A Absolutely, yes.

Q I want to share a screen now, Mr. Byrne. This is Milligan Exhibit 5. It is the report of one of their experts, Dr. King, and she is offering opinions on certain issues. I want to read this introduction section into the record so you can get some context. Dr. King writes, White law makers in Alabama learned long ago to color mask their public statements, just as they have learned to color mask the legislation intended to protect their racial prerogatives.

[1690] Not since the high tide of brazen white supremacy when George Wallace proclaimed, segregation forever, have public figures been so bold.

MS. WELBORN: Mr. Davis, this is Dr. Bagley's report, not Dr. King's report.

MR. DAVIS: I apologize for that confusion. Yes. Thank you for the correction.

BY MR. DAVIS:

Q Then Mr. Bagley after giving some examples says this.

JUDGE MARCUS: I think you have to just – as we proceed, Mr. Davis, just take your time and speak right into the speaker.

MR. DAVIS: Thank you, Judge.

BY MR. DAVIS:

Q I will read now an excerpt into the record from Milligan Exhibit 5, the Bagley report.

Dr. Bagley writes, Representative Bradley Byrne of the State's First Congressional District when he was vying for a Senate seat aired a campaign ad in which he condemned black people by placing their images in a fire.

The television spot begins with Byrne staring into a wood fire in a backyard and lamenting the loss of his brother in the armed services. He shifts to lamenting the course the country is taking as the faces of black and brown people appear in the fire. Former national football league quarterback Colin [1691] Kaepernick appears in the fire as Byrne calls him an entitled athlete dishonoring the American flag. Members of the congressional caucus known as the Squad, Ilhan Omar and Alexandria Ocasio Cortez appear in the fire and are accused of attacking America and cheapening 9/11. No white people appear in the fire.

My question to you, Mr. Byrne, is: Is there anything you care to say in response?

A Yes, sir. That ad was about my brother. And the fire was a fire in the fire pit at our hunting camp that he and I used to sit around all the time. So that ad was about my brother.

Now, the fact that I'm contrasting a rich, NFL quarterback named Colin Kaepernick who won't stand up during the national anthem with my brother's

service who made far less than Colin Kaepernick makes and literally contracted a disease during one of his deployments with the 20th Special Forces group that killed him, I think that's a legitimate thing for me to raise. I have grave disagreements with Representative Alexandria Ocasio Cortez and Representative Omar. But I can tell you I never had any negative interaction with either one of them.

Representative Alexandria Ocasio Cortez, actually, her office was in my office building. And when she was relatively new, she couldn't find her way to her office and literally stopped me in the hallway and asked me, can you tell me where my office is? I said, yes, ma'am, and I told her where it was. [1692] And we sort of developed a personal rapport just because she got to the moment of weakness, which we all have in Congress by the way. It's easy to get lost in those buildings.

So we never really had a political conversation, but we would have these personal sort of, you know, informal social interactions. I disagree with her on the issues, but I don't have any problems with her as a person.

The same is true for Ms. Omar. Now, Ms. Omar served on the Education and Labor Committee with me. So we would have interactions about education issues, and we had some disagreements about – but there was no – that was really about my brother. It was not about those other people. And the fact that we used them was to simply contrast them and their positions

with the service that my brother had rendered to our country.

Q Was it your intention to single out anyone because of their race?

A No. I singled out Mr. Kaepernick because he won't stand up during the national anthem, and there are plenty of black athletes that stand up during the national anthem by the way. I have noticed that's not as what a lot of people try to portray it to be.

And I am singling out Ms. Alexandria Ocasio Cortez and Ms. Omar because of their attacks against America. They attack American values. And I think it's perfectly within the realm [1693] of what's appropriate dialogue to say, I expect somebody that's making this money as Colin Kaepernick to stand up during the national anthem, and I don't think members of Congress should be attacking the country.

Q Mr. Byrne, I want you to think of the people who are involved in congressional campaigns, whether it's a candidate or someone considering a run, that person's staff, volunteers, and then I want you to assume that a couple of weeks before the January 28th deadline, the congressional map changes from the way it's usually been and what the Legislature passed to all of a sudden it changes to something like what the plaintiffs are representing excuse me – what the plaintiffs are proposing.

Do you see any issues that would cause with congressional campaigns?

A Yes, sir. First of all, we have primaries in four months, general election in ten months. Once you turn the calendar to the beginning of the year, you have that primary staring you in the face, you have already set your campaign in place. You already have your plan in place. You have already got volunteers set up ready to go. You have got, you know, the campaign ad messaging already worked out. And you are hitting the ground running.

So if you change my district on me with that little time, it's going to put a substantial burden on my ability to refocus my campaign, conduct my campaign, get volunteers, et cetera. [1694] And particularly if you give me a new geographic area that I haven't represented before, where I don't have, you know, the natural contacts, et cetera, that's a huge problem for any community. And I don't – and that's true for any candidate, Democrat, Republican, people that are long-time public office holders, people that are brand new. It could be a tremendous difficulty.

Q Mr. Byrne, you said you went to a public hearing where some of these districts were at issue. Why did you go to the public hearing? Why are you here today to talk to the Court about districts?

A Number one, I am a citizen, so I have – so I am not just any citizen. I mean, I served on the state school board, held a district for eight years. I served in the United States House of Representatives representing one of the districts for seven years. I have, you know, a unique set of understandings about what it's like to

represent these areas. And I felt like I owed it to the system. I owed it to the public to stand up and say – as somebody that’s actually done this work, these districts the way I’m proposing them makes sense this way.

And the most important thing I was trying to say is keep this particular community together. Keep these communities together. Don’t pull southwest Alabama apart because we work together down here. Mobile area Chamber of Commerce doesn’t just do economic development for Mobile County. They also do [1695] it for Washington County.

JUDGE MARCUS: Let me stop you for a second, Mr. Byrne. You cut out. The sound cut out for a minute. So take your time and just repeat what you just said if you would, please.

THE WITNESS: Yes, sir. What I have been the most concerned about is that people that pull apart southwest Alabama and have different parts being represented – we work together down here in southwest Alabama. The example I used was the Mobile area Chamber of Commerce, the economic development for both Mobile County and Washington County, because we’re so closely connected.

We need to stay together down here. We have a group called CAP, Cultural Alabama partnership, that pulls together these counties so that we have common representation, common advocacy efforts with the Alabama Legislature and the members of Congress. So keep us together. Don’t pull us apart. Let us be one

group of people that work together for our region of the state and maximize the benefits that we want to get for our people down here.

MR. DAVIS: Thank you, Mr. Byrne. I have no further questions and pass the witness at this time.

JUDGE MARCUS: Thank you, counsel. Cross-examination in what order did you propose to proceed on behalf of Milligan and Caster and the Singleton? And we leave that up to you.

[1696] MS. WELBORN: I will be going first for the Milligan plaintiffs, Your Honor.

JUDGE MARCUS: All right. And, Mr. Whatley, would you be going second or the Caster folks going second?

MR. WHATLEY: Doesn't matter to me, Your Honor.

JUDGE MARCUS: I leave that up to you. So let's begin –

MR. WHATLEY: I am happy for the Caster plaintiffs to go second.

JUDGE MARCUS: All right. Thanks very much.

Ms. Welborn, you may proceed with your cross-examination.

MS. WELBORN: Thank you.

CROSS-EXAMINATION

BY MS. WELBORN:

Q Representative Byrne, my name is Kaitlin Welborn, and I represent the Milligan plaintiffs. Good morning.

A Good morning.

Q So I'd like to talk about the current redistricting plan first. You had no direct role in drawing the current congressional map in Alabama, right?

A I didn't have any direct role, but I did testify before the committee.

Q But other than that, you did not do anything to –

A That's correct.

Q – help draw the congressional map?

[1697] A That's correct.

Q And you did not provide any input to Mr. Hinaman, the map drawer?

A I did not know Mr. Hinaman.

Q I'm sorry?

A I don't think I know him.

Q Okay. And you did not speak with Representative Pringle about the 2021 map?

A I did.

Q You did?

A Yes.

Q I'm sorry?

A He is the chair of the committee, and I testified before the committee.

Q Okay. But did you speak to Representative Pringle outside of the public hearing?

A I don't believe I did, no.

Q Okay. And did you not speak with Senator McClendon outside of the public hearing?

A I don't believe I did, no.

Q And you did not speak with Secretary Merrill's expert Thomas Bryan?

A No, ma'am.

Q Okay. You first ran for Congress in a special election in 2013, right?

* * *

[1849] MR. LACOUR: Thank you, Your Honors.

This case represents an extraordinary attack on an ordinary map.

We have here an equal protection claim that lacks any mention of the current Legislature's intent, and we have a Section 2 claim in which the plaintiffs themselves have proven through two of their experts that

you could not draw two majority-minority districts if you drew based only on traditional race-neutral districting principles.

So plaintiffs' equal protection claim fails because traditional race – redistricting principles were not subordinated to race in the 2021 Legislature's map. And plaintiffs' Section 2 claims fail at *Gingles I* because in each of their 11 illustrative plans, traditional redistricting principles are subordinated to race.

But before I get into the merits any further, I did want to touch on the fact that the burden is incredibly high here. Not only are they seeking an injunction, which is an extraordinary and drastic remedy in and of itself, they're asking for what essentially would be a mandatory injunction where the burden would need to be even higher on them.

Let me move to the other laptop closer. Is this a little bit clearer?

JUDGE MARCUS: It is. Thank you.

MR. LACOUR: Thank you.

* * *

[1882] that because of what she was asked to do as a *Gingles I* expert, she took the 50 percent as a nonnegotiable threshold. And then she only bent and broke insofar as was necessary not to come under 50 percent. So, for example, I think – and I don't have the cite handy, but my memory is that she testified that after

50 percent, for example, she took not splitting counties to be of greater priority.

Why is that inconsistent with the Section 2 mission? I completely understand your argument as to why it's inconsistent with the idea that we ought not be separating voters based on race for constitutional purposes.

But in the limited universe of a Section 2 claim, why is that hierarchy so long as it respects other traditional districting principles insofar as it can along side the 50 percent threshold, why is it inconsistent with Section 2?

MR. LACOUR: Because I don't think that's what the Court was referring to when it said reasonably compact. Again, reasonable compactness analysis takes into account traditional districting principles. And drawing a non-compact district to benefit a racial group is not a traditional districting principle. If it is, it makes their whole two Section 2 compactness argument self-referencing and really indecipherable.

They're saying, we could draw a reasonably compact map consistent with traditional districting principles if we ignore [1883] some of them in favor of race. But that means it's not reasonably compact. That's why the Supreme Court has said Section 2 does not require a state to draw based on predominantly on racial lines a district that's not reasonably compact. What that necessarily means is that reasonable compactness has to be without reference to race.

Now, like I said, if she drew two maps consistent with racial – consistent perfectly with traditional districting principles, and one had two majority-minority districts and one didn't, it would be perfectly fine for her to pick the one that had the two majority-minority districts.

But what she testified to was that she drew 2,000 such maps, 2000. Not 2000. 2 million. I am sorry. I was off by the three zeros. 2 million maps where she didn't even plug in all of our traditional districting principles into the algorithm constraints. She had even more discretion than the Legislature would have had to go out looking for majority population to put within a district. And not one of them came back above 50 percent. I mean, not one of them came back with two districts above 50 percent.

And I – so I don't know how it could be even – how it could be any clearer that race predominated.

I mean, it's not even a one in a million map we have in front of us. These are maps you would never expect to see. And I don't see how it could be that – to return to the text [1884] of Section 2, we are talking about equal opportunity and whether anyone has had equal access so political process denied them based on account of race. I mean, is the Legislature's failure to completely scrap several race-neutral traditional districting principles and bend others in favor of race, like isn't a refusal to do that somehow denying someone equal opportunity? I think the answer is obviously no.

And you look at *Abrams*, again, keep in mind, I think they hone in a lot on proportional representation. And you see it throughout. But, of course, throughout the briefing – but, of course, Section 2 expressly says proportional representation is not the benchmark. And we know it can't be the benchmark because Georgia in the '90s had 27 percent black population just like Alabama today. They have 11 districts they can work with. We only have seven.

And even then the district court said, Section 2 only gives me free reign to draw one majority-minority district, 9 percent of the state's black population – or 9 percent of the state's congressional districts were majority black, even though 27 percent of the state's black population – or blacks made up 27 percent of the black's population, and the Supreme Court affirmed that.

I think then in vote dilution itself, you heard about vote dilution from plaintiffs. I mean, it diluted against what? Against what standard? And proportional representation is not [1885] the standard. It was an interesting discussion with Dr. Duchin talking about Massachusetts and the Republicans there. And because the Republican population in Massachusetts is so evenly dispersed across the state, I mean, what she testified to was that it is literally impossible to draw even one majority Republican congressional district in Massachusetts, despite the fact that there are nine congressional districts from the state and despite the fact that Republicans regularly register about a third, 35 percent in statewide elections.

So proportion representation is not the right baseline. The right baseline is what would you expect from a race-neutral draw of the districts? And we didn't have time to go out and get an expert with an algorithm to produce 10,000 maps. But the plaintiffs did. And we know what came back. 30,000 maps from Dr. Imai, none of which have two majority-black districts, and 2 million maps from Dr. Duchin, none of which have two majority-black districts.

So, again, unless you are going to impute race as a traditional districting principle in the Section 2 compactness analysis, which I think the Court pretty expressly rejected in *Abrams* when they found the three-judge court's decision in that case, there is no way they can satisfy *Gingles I*. It's a mathematical impossibility.

JUDGE MANASCO: Thank you. I think you answered my question.

* * *

[1902] JUDGE MARCUS: Thank you very much, Mr. LaCour. We will take our usual break of 15-minute break and then come back with the rebuttals, and we will finish up this afternoon.

Thank you all. We will be back in 15 minutes.

MR. LACOUR: *Favors* was the longer quote.

JUDGE MARCUS: Why don't you give us the full title of that case that came under the Eastern District of New York.

MR. LACOUR: *Favors v. Cuomo*, 881 F. Supp. 2d 356, 362 – or at 362. That’s Eastern District of New York 2012.

JUDGE MARCUS: Thank you much. We will take a 15-minute break at this point.

(Recess.)

JUDGE MARCUS: The parties are ready to begin the reply at this point? Do I have that right, Mr. Blacksher, Ms. Khanna, and Mr. Ross?

MR. BLACKSHER: Yes.

MR. ROSS: Yes, Your Honor.

MS. KHANNA: Yes, Your Honor.

JUDGE MARCUS: All right. Thank you.

Mr. Blacksher? We will take it in the same order that the arguments were made by the plaintiffs.

MR. ROSS: Your Honor, if I may, the Caster plaintiffs have allowed the Milligan plaintiffs to go next.

JUDGE MARCUS: I’m sorry. You mean the Singleton plaintiffs.

[1903] MR. ROSS: Oh I’m sorry. I believe it will go Singleton, Milligan, and then Caster. I’m sorry, Your Honor.

JUDGE MARCUS: Thank much. Mr. Blacksher, you may proceed.

MR. BLACKSHER: Judge, you made – Judge Marcus, you made a – asked an important question.

If the Court rules for the plaintiffs, what should it tell the Legislature to do? Because whatever this Court tells the Legislature – what it tells the Legislature it did wrong, and what it tells the Legislature it must do right in the future is going to be the benchmark for re-drawing congressional districts probably for several more decades.

So it seems to us that the choice is between telling the Legislature that it must draw districts by beginning with a racial target, or whether it should draw districts by beginning with traditional districting criteria, we believe that if this Court were to rule for the plaintiffs – the Milligan and Caster plaintiffs on their Section 2 claims without addressing their Fourteenth Amendment claims, that necessarily says to the Legislature the 2021 enacted plan violated the Voting Rights Act because it did not contain two majority-black districts, per *Bartlett vs. Strickland*. Now, that's going to say to the Legislature that they should begin any remedial plan with a racial target.

What the Singleton plaintiffs have proposed is that the [1904] Court say to the Legislature the problem with your 2021 plan is that it perpetuated a gerrymander that violated traditional districting principles by splitting Jefferson, Tuscaloosa, and Montgomery counties for the purpose of reaching a racial target, namely a black-majority district. And, therefore, you

should begin again solely with race-neutral principles which are historically in Alabama, whole counties, and see what kind of plan you can draw, and then to achieve the lowest practicable population deviation, and then look to see whether or not it complies with Section 2 of the Voting Rights Act.

If it does not comply Section 2 of the Voting Rights Act by providing blacks the opportunity to elect candidates of their choice that Section 2 guarantees, then your plan must be modified however is necessary to accomplish that statutory objective.

So that's critical to us. We have been interested from the beginning in the Singleton case, our clients are interested in trying not only to win a lawsuit for 2022, but to try to get our redistricting process back on track. That's something that legislators and ordinary citizens and incumbent members of Congress can understand and apply without having to have a statistician with algorithms next to their elbow.

Let me respond to something that Mr. LaCour said. He's characterized the Singleton plaintiffs' claims as a novel Fourteenth Amendment claim. It is nothing but novel. And let

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[1927] CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Christina K. Decker
Christina K. Decker, RMR, CRR
Federal Official Court Reporter
ACCR#: 255

01-12-2022
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BOBBY SINGLETON, et al.,	*	
	*	
Plaintiffs,	*	2:21-cv-1291-AMM
vs.	*	January 26, 2022
JOHN MERRILL, in his	*	Birmingham,
official capacity as Alabama	*	Alabama
Secretary of State, et al.,	*	1:00 p.m.
	*	
Defendants.	*	
* * * * *	*	
EVAN MILLIGAN, et al.,	*	
	*	
Plaintiffs,	*	
vs.	*	
JOHN MERRILL, in his	*	2:21-cv-1530-AMM
official capacity as Alabama	*	
Secretary of State, et al.,	*	
	*	
Defendants.	*	
* * * * *	*	
MARCUS CASTER, et al.,	*	
	*	
Plaintiffs,	*	
vs.	*	
JOHN MERRILL, in his	*	2:21-cv-1536-AMM
official capacity as Alabama	*	
Secretary of State, et al.,	*	
	*	
Defendants.	*	
* * * * *	*	

TRANSCRIPT OF PRELIMINARY INJUNCTION
HEARING VIA ZOOM CONFERENCE
BEFORE THE HONORABLE ANNA M. MANASCO,
THE HONORABLE TERRY F. MOORER,
THE HONORABLE STANLEY MARCUS

Proceedings recorded by
OFFICIAL COURT REPORTER, Qualified pursuant
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* * *

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[10] **PROCEEDINGS**

(In open court.)

JUDGE MARCUS: Good afternoon. We set this case down for an additional conference really as a way to see where we are, what the status is at this point.

If you would all be kind enough to state your appearances on the record, we would be much appreciative. For Milligan?

MR. ROSS: Deuel Ross for the Milligan plaintiffs.

JUDGE MARCUS: Good afternoon again to you, as well. And for Caster?

MS. KHANNA: Abha Khanna for the Caster plaintiffs.

JUDGE MARCUS: Good afternoon to you, as well. And Singleton.

MR. BLACKSHER: Jim Blacksher for the Singleton plaintiffs, Your Honor.

JUDGE MARCUS: Good afternoon to you.

For the Secretary of State and for the intervening defendants.

MR. DAVIS: Hello, Judge. Jim Davis is here. Mr. LaCour is also on line. And Mr. Walker is here with me for the –

JUDGE MARCUS: Welcome to all of you, as well.

I did also want to make clear – the clerk asked me to double check this – that the folks we have in the Zoom are only folks participating in the proceeding. Otherwise, there's [11] another link that anyone can use, that the public can use to zero in on and fully follow our proceedings today.

Having said that, I really wanted to throw out to each of you to tell me exactly what the status of the case is, where the Legislature is, in regard to the memorandum opinion and order that we had issued on the 24th of January.

With that, I thought we would turn first to you, Mr. Davis, on behalf of the State.

MR. DAVIS: Thank you, Judge.

As you know, we have exercised our right to appeal. We have sought a stay with this Court. And if it's declined, we intend to seek a stay from higher courts.

As far as the Legislature is concerned, they are looking at this issue. Discussions have begun. They are in a special session at the moment on another important issue. But we have already started looking at this.

That's really, Judge, all the information that I have at this point. How long it would take, whether they would be successful is simply too early to say.

JUDGE MARCUS: The reason, of course, that we raise it, as you have all pointed out, time is something of an issue here. We have said repeatedly, and we made this observation in the order that we had entered, that reapportionment is primarily the duty and the responsibility of the State. And federal courts are barred from intervening in state [12] apportionment in the absence of a violation of federal law precisely because it is the domain of the states to conduct apportionment in the first place. Putting it differently, each state has a sovereign interest in implementing its redistricting plan.

And so even when a federal court finds that a redistricting plan violates federal law, the Supreme Court has repeatedly said that redistricting and reapportioning legislative bodies is a legislative task, which the federal courts should make every possible effort not to preempt.

If and only if the State Legislature is unable to adopt a remedial map that complies with federal law in sufficient time to address the upcoming elections in November of this year and in May for the primaries, only then would it fall to a federal court to take on the unwelcome obligation of devising a – and imposing a reapportionment plan. And that's obvious clear hornbook law. And so we obviously look, Mr. Davis, to the Alabama Legislature for guidance and input in this connection.

We set some time deadlines here that we thought were reasonable and were consistent with the ability

to craft a new map and implement it in sufficient time for the elections that are coming up down the road. But that's why we really wanted to get your best sense and the sense of the intervening defendants, Mr. McClendon and Mr. Pringle, of where we are and whether we have to start down this road because the Legislature [13] may be unable to do it.

So it's really for that reason that we wanted to sort of crystalize it, bring all of this to a head, and see where you were in that regard.

MR. DAVIS: Thank you, Judge.

Obviously, we disagree with the Court's ruling, but we do agree it is appropriate to give the Legislature the first shot.

That's what has begun. Whether they will be able to do so or how long it will take is simply too soon to tell.

JUDGE MARCUS: Do you have any idea when you will be able to give us an answer to that question?

MR. DAVIS: Certainly the Court's order says that Senator McClendon and Representative Pringle should report back in two weeks. I would think probably it will take less than that time to know whether or not they will be able to do something. But certainly within two weeks they will know if there's any chance of getting it through the Legislature.

JUDGE MARCUS: Right. You understand our concern is that we don't want to be in a position two weeks from now where we're starting from square one at that point, to pick a cartographer, and a numbers cruncher, and a special master, which might take us to implement another two weeks, and therefore put the whole thing off four weeks. You appreciate that dilemma.

MR. DAVIS: Well, I appreciate it. We think it's [14] already too late to put plans in –

JUDGE MARCUS: I understand.

MR. DAVIS: Yes. So we certainly appreciate it. We understand the Court's concern. I simply have no further information.

JUDGE MARCUS: All right. Other comments, either from counsel for Mr. McClendon or Mr. Pringle?

MR. DAVIS: I don't have comments, Your Honor. There is a question that I think the Court may be able to clear up about the order.

The order states that the January 28th qualifying deadline is extended for 14 days. I think we know what the Court's intent was, that it was to extend the deadline for congressional candidates only, but the broadness of the language is causing some confusion in the public.

JUDGE MARCUS: Let me make that point abundantly clear.

This order, these hearings were concerned only with the congressional hearings and the congressional map. And in order to make that crystal clear, if you think it would be helpful, we will put out a supplemental order to that effect making it absolutely clear this order was only dealing with what was properly before this three-judge court, which dealt solely with the congressional map.

MR. DAVIS: That's certainly what we thought, Judge. [15] And, yes, Mr. Hugh Evans, who is general counsel for the Secretary, is with me, as well. And he is indicating to me that that would be helpful for the Secretary to provide proper guidance to the party candidates.

JUDGE MARCUS: I think that's something we can take care of forthwith. As soon as we're done, we can get something out to you this day that makes that point crystal clear.

Comments from counsel for Milligan, Caster, and Singleton?

Mr. Ross?

MR. ROSS: Thank you, Your Honor.

Our concern is the same as the Court's, that the – whatever happens with the Legislature or with their attempt at a stay, that the Court hopefully can begin the process now of potentially looking for a special master.

So if the Court would like, the Milligan plaintiffs are willing to work with the other plaintiffs' groups, and, if necessary, we're happily to work with the defendants as well on naming some potential special masters for the Court.

JUDGE MARCUS: You understand in that regard what we would need if we are put into the position where we have to draw the map would be we would need to select a cartographer, as well as somebody – let's use the infelicitous term – a numbers cruncher, along with the special master. So our needs would cover both a special master and someone or some folks to do the actual tasks pursuant to whatever specific instructions [16] we may give them.

Other thoughts, Mr. Ross?

MR. ROSS: No, Your Honor. If you would like us to, we are happy to get with the other parties and get some names to you in the next few days.

JUDGE MARCUS: All right.

Ms. Khanna, on behalf of the Caster plaintiffs?

MS. KHANNA: I agree with Mr. Ross, Your Honor, that it makes sense while the Legislature is proceeding to get our – to get – for the Court to get its ducks in a row by identifying potential special masters, and perhaps securing them so that we're ready in the event that the Legislature is unable to draw new maps that are remedial maps.

The Court mentioned a numbers cruncher. I know there are several names that we can all discuss and we can submit in writing, I think is probably more fruitful.

My understanding is many of them more experienced special masters do both map drawing and map evaluation. So they can evaluate maps to see whether or not they're performing for minority candidates, or performing various metrics, as well.

So it might be that those – I am not sure what the Court has in mind, but that special master exists in one person, but certainly we can offer more options to the Court.

JUDGE MARCUS: Thank you.

Mr. Blacksher?

[17] MR. BLACKSHER: So, Your Honor, it may be premature for me to raise this with the Singleton plaintiffs or the Singleton plaintiffs to raise this, but in the Court's injunction you said because it's on statutory grounds and because Alabama's upcoming congressional elections will not occur on the basis of the map that is allegedly unconstitutional, we decline to decide the Singleton plaintiffs' constitutional claims at this time. And our question really is what happens if this Court or a higher court stays the preliminary injunction? Would that be an appropriate time we would be concerned at that time our concerns would be heard?

JUDGE MARCUS: Yes, I understand. And that's a matter that we could take up if we had to. We

will ultimately rule, of course, on your constitutional claims. And the claims were made on constitutional grounds by Mr. Ross on behalf of the Milligan folks, as well as though their theory and argumentation is a little bit different than yours, they also challenge the map HB-1 on constitutional grounds.

So we just followed the classic admonition that a court ought not to decide a constitutional issue before it has to do so. And we thought given our preliminary injunctive ruling and memorandum opinion about Section 2, that we were not at that stage.

And it's not to say, Mr. Blacksher, you are not entitled [18] to a ruling on that. It's just we did not think we ought to address that issue at this point.

Let me turn to my colleagues, Judge Manasco and Judge Moorer, and ask them if they had any additional questions, observations, or comments.

Judge Manasco?

JUDGE MANASCO: None from me.

JUDGE MARCUS: Judge Moorer?

I don't think we can hear you, Judge Moorer.

JUDGE MOORER: I'm sorry. No questions.

JUDGE MARCUS: All right. Well, let me run a couple of other thoughts by you.

But one of the things that we – by “we,” I mean Judges Moorer, Manasco, and myself – were thinking

about if it becomes necessary for the Court to draw the maps, of doing something like the following, and we throw it out to you for your comments. And we welcome your input from the State, as well as from the plaintiffs, about your judgment about the most efficacious way to do this.

We would first be looking for someone or some group to help us draw the maps. We've thought about pairing together or coupling either Mr. Hinaman, who is an experienced cartographer, along with Dr. Cooper; or pairing up Mr. Hinaman with Dr. Duchin, but using some combination of them to actually be the arm of this Court to do the drafting itself.

[19] And, of course, pursuant to Rule 53 of the Federal Rules of Civil Procedure, and pursuant to the inherent power of this Court, we would be selecting a special master, as well, and in addition to the folks that we would select for the purposes of actually drawing the maps.

The reasons we focused on the three of them, quite candidly, was we wanted to share this with you because we very much want your input and guidance, was in the case of Hinaman, who is a very experienced cartographer. He has been at it, and he's done this map three times, going back to '92, again in 2011, and in 2021. And in the cases of Dr. Duchin and Mr. Cooper, this Court was satisfied and found that they were exceedingly qualified in their relevant fields. And so we thought that it might make sense to pair them in the

process and use them as an arm of this Court for that task.

And this is just preliminary thinking on our part. But we candidly wanted to think out loud with you, Mr. Davis and Mr. Walker, and with you, Mr. Ross, Mr. Blacksher, and Ms. Khanna, to get your comments about it.

You may want to think about it. You may not want to comment now, but which we will happily give you.

But what are your thoughts? Mr. Davis, any comments?

MR. DAVIS: Not at this time, Judge. I think I will take you up on your offer to let us confer among ourselves and perhaps with Mr. Hinaman before I share any thoughts with the [20] Court. I think I need to discuss that with my colleagues.

JUDGE MARCUS: Sure.

Mr. Ross?

MR. ROSS: Your Honor, I think we have some concerns. I think we would propose an alternative whereby perhaps the Court could set some dates or deadlines by which our experts could propose alternative maps.

So whether, you know, Dr. Duchin could propose some maps that are different than the illustrative maps that she proposed that perhaps do things like protect incumbents, or other issues that, you know, the Court identifies, or the defendants identify. And then

the Court would have an opportunity – we would have some guidance from the Court on what they would like to see. And she could produce some maps for the Court and she could give testimony.

JUDGE MARCUS: Let me just make two observations for you in that regard.

First observation: The Legislature, to the extent it draws this map, is perfectly free to consider the issue of incumbency. The law certainly allows for that.

Our concern is that Section 2 of the Voting Rights Act be complied with. But it seems from the evidence that was presented to us – I say this pointed you to you, Mr. Davis – that a map could be drawn conceivably that respects incumbents in whole or in part. How much, how well, how easy is the [21] question for another time. But we do make that observation.

If the Court is called upon to draft the maps, we might not give the same emphasis or priority to that consideration, although it is fairly a consideration among a host of them, including compactness, contiguity, respecting political boundaries, divisions, counties, cities, municipalities, precincts, the doctrine of one person one vote, the consideration surrounding the Voting Rights Act itself. It's something that may properly be considered, is all I'm really saying. And the state Legislature can do that conceivably in drawing a map, so long as it complies with the core holding regarding the requirements of Section 2 of the Voting Rights Act.

But I wanted, second, Mr. Ross, to just probe a little bit more, if you are comfortable sort of giving me your sort of initial reaction to what we were suggesting. I sense that you have a concern.

Is there something that you can at least preliminarily express to me? Is it a concern that we have considered actually teaming up the State Legislature's cartographer with either Dr. Duchin or Mr. Cooper?

MR. ROSS: I think we have –

JUDGE MARCUS: You think that's unworkable or a bad idea for some reason? And I only see it because it struck us at least initially that there was a lot of soundness to [22] considering it doing it – doing it in that way, given the experience that each of the players brings to the underlying task.

So I just wanted to ask you a little bit further, if you are comfortable giving me some preliminary sense, and Judge Manasco, Judge Moorer, your preliminary thoughts on that matter.

MR. ROSS: Thank you, Judge Marcus.

I think my preliminary concern – and my colleagues share it – is that there – a concern about potential privilege issues, since they are our expert and this is a preliminary injunction hearing, that we may not want them having conversations about the case with other parties. And so that is what comes off the top of my head. There may be ways around it, but that's my initial concern.

And my other thought is that, you know, the way that this has sometimes worked in other cases is that the Court will have its own special master, the parties will have the experts that they may use, and the Court could provide a list of criteria that the Court considers important.

I listed incumbents just because it was a thing that came off the top of my head. But there are many other factors the Court can say these should be prioritized, these should not be, and then the parties could offer maps that the Court's special master could consider on its own or not.

[23] So, again, I don't think I'm saying no, but I think that was the initial concerns.

JUDGE MARCUS: I understand. Let me make one observation for you that just sort of comes off the top of my head as I think about what you have said.

If we were to basically make as an arm of the Court Duchin and Hinaman, or Cooper and Hinaman, they would be working for us at that point, not you. We would certainly not invade any prior discussion or conversation that you may have had with them.

Beyond all of that, we will, regardless of who is selected if – and I underscore if we are required to step down that road – we will issue an order laying out the guidelines here. They will be very specific, very direct, and it will tell the special master and the map drawers what it is that we believe their task must accomplish

and what considerations they must take into account. But I just wanted to share that with you.

Ms. Khanna, thoughts?

MS. KHANNA: Yes, Your Honor.

I really appreciate the Court's consideration of this issue, because I think these are all great map drawers. I do share Mr. Ross's concern.

And I think it's not that we feel like we would – that our experts would disclose anything, or that the Court would ask them to disclose anything of our given privilege.

[24] I think I just – again, thinking about it without having really analyzed the issued or not, I have not been presented with this before, I would be a little worried about relinquishing our experts who we rely on for map drawing and evaluation to the Court, if we can't otherwise get them back as the case proceeds or as the remedy process proceeds.

I also think that for all intents and purposes, all three of the map-drawing experts that you mentioned will be participating in the remedy process. I have – I presume Mr. Hinaman will be working with the Legislature to draw any remedy map that they're able to propose. As Mr. Ross said, our experts can propose additional maps, in addition to their illustrative plans to – if there's any particular court guidelines that are set forth that they need to adhere to.

We will – those three experts I have to assume will be opining on other parties’ maps and what they have proposed.

So I think the Court will still have the benefit of their map-drawing expertise and analysis of the various factors even if it doesn’t necessarily create – suggest that they are, in fact, becoming an arm of the Court.

JUDGE MARCUS: Mr. Davis, what are your thoughts?

MR. DAVIS: Nothing further. As I said, Judge, I would like to discuss it with my colleagues.

JUDGE MARCUS: So you are not quite ready to throw cold water on the idea we threw out.

[25] MR. DAVIS: I am not. I haven’t had a chance to discuss it.

JUDGE MARCUS: I appreciate that.

Mr. Blacksher?

MR. BLACKSHER: We’re the only parties with no expert demographer at our sides.

And I would only say that Randy Hinaman and Bill Cooper know more about Alabama than any other map drawers alive. And not just the boundaries, but the internal workings of the state, the culture and the politics.

But – and that’s all I have to say. And I think Bill Cooper is the best map drawer in the U.S., so that’s what I think.

JUDGE MARCUS: It just occurred to us, counsel, that one way that this could be done with great dispatch would be to team that group up in some, you know, in some combination, or formation.

Any other comments, Judge Manasco, or Judge Moorer, on this issue?

JUDGE MANASCO: I think – all that I would add is, having heard the concerns about privilege, you know, I would invite the parties to think creatively about a way to facilitate an opportunity for collaboration between those three individuals that could unfold in a manner that respects the privilege, but does not forego the potentially, you know, the [26] sort of synergistic effect and the potential efficiency of having them collaborate in a way that is not adversarial, where we see a proposal from one, a proposal from another, or a proposal from another, or something in that manner.

I mean, to sort of use the shorthand to the extent that we can get the, you know, some combination of them in the same room at the same time to think about these issues that could be – if – and I hope we are not required to, but if we are required to step down this path, that that could be an efficient way to begin.

So if, you know, the Court’s initial idea is imperfect, I would invite the parties to collaborate about a

way to sort of achieve a similar result in a manner that would be more consistent with concerns about the privilege.

JUDGE MARCUS: Judge Moorer, any questions or comments in connection with any of this?

JUDGE MOORER: Mr. Davis, this is more for you.

I appreciate the fact that you have got clients that you have got to get with, and you've got your colleagues on the defense team to interact with.

But, ultimately, I hope that you carry the message to your side that this process is going to go forward, and it will be done.

The Legislature, of course, has not only incumbency to play out, but they have other competing political interests [27] that are valid to play out in a political scene, such as the passage of a reapportionment map.

And I hope that you will convey to your clients that if they don't engage in that process, how much they would be losing that is of value to the entire process. And encourage you to encourage your clients to essentially do what is the Legislature's responsibility.

But I would also ask that you convey to them just as strongly that it is going to be done in such a way that the ultimate end goal – the elections that must occur – can occur in an orderly fashion.

MR. DAVIS: Your Honor, I don't quite know what to say. We take very seriously our role as officers of the Court and as attorneys for –

JUDGE MOORER: I know you do. I am trying to give you the imprimatur of the Court that you can pass along to your client –

MR. DAVIS: I want to assure –

JUDGE MOORER: – to encourage them. I am sure that you as an officer of the Court are trying to encourage your clients to act quickly. But ultimately it's got to be done, this map process, and it will be done.

MR. DAVIS: Well, thank you, Judge. Everything the Court says and everything the Court orders, we carry that to our client and make sure that we do our best to advise them of [28] their legal obligations.

JUDGE MOORER: Yes.

JUDGE MARCUS: I think the only point here that's being made, Mr. Davis – and we made this point in the original order that we entered – if and only if the State Legislature is unable to adopt a remedial map that complies with the requirements of Section 2, it would fall then to the courts to address that.

I repeat to you words that I've read and said to myself many times in an opinion entered by Justice White many, many years ago.

He said, and I quote him, That legislative bodies should not leave their reapportionment tasks to the federal courts; but when those with legislative

responsibilities do not respond, or the imminence of an election makes it impractical for them to do so, it becomes the unwelcome obligation of the federal courts to devise and impose a reapportionment plan pending later legislative action.

And it makes the point that this is quintessentially a legislative task. And we recognize that and underscore that. But if we have to do this, there should be no misunderstanding that we will do what our obligation requires us to do. We're saying no more and no less, putting great faith, I should say, in Alabama's Legislature to do this.

Any other thoughts or comments about this or status? Any [29] other issues anybody wanted to raise?

We have, of course, in front of us pending the application for stay, Mr. LaCour, that you submitted, and we have had a chance to study that at some length, I guess since yesterday, and the response that we received from the Milligan and Caster folks. And we will rule on that shortly, promptly.

But if there's anything you wanted to add with respect to that, we're more than happy to give you a chance to do that, as well.

MR. LACOUR: Nothing more to add, Your Honor, other than we do, as we asked for in the motion, we do respectfully ask the Court to rule quickly based on what we have heard today. It sounds like we've got an inclination of how the Court's going to rule. And if

the Court does deny, we do intend to seek a stay on appeal as quickly as possible.

JUDGE MARCUS: Sure. I understand that. Mr. Ross, Ms. Khanna, anything further on that issue?

MR. ROSS: Not on the stay, Your Honor. But I did want just to on your earlier point propose something. And again we will have perhaps some time to think about it.

But if there were an opportunity for a court-ordered mediation, that may address some of our concerns and allow our experts to talk to the State's map drawers.

JUDGE MARCUS: Explain that. Sort of spin that out to me. The reason I raised it is normally when we use mediation, [30] let's say we have a group of mediators on the U.S. Court of Appeals that we use. When we send a case to a mediator, basically, our involvement ends insofar as we dictate nothing to the lawyer, the parties, or the mediator. If he and they are able to work a solution, that's fine. If they aren't, so be it, and it goes on for oral argument.

And on a district court, much the same way. If a district court sends a case out for mediation, generally it will leave it to the parties to see what they can do.

The problem that strikes me initially with mediation is that I don't think that it helps us, in terms of the issues of timing that we, you know, that we otherwise face.

What I would like to do at this point, if you can bear with us, is just to take a short break for a few minutes to give me a chance to counsel with my colleagues, and you can give some further thought to some of the things we've discussed, as well.

It is by my clock 1:36 Central Standard Time. I thought we would bring you back here at 2:00 o'clock Central Standard Time, which would be 3:00 Eastern Standard Time.

Is that okay with you folks? Can you stick around with us for another 20 minutes or half hour?

MR. DAVIS: Yes, Your Honor.

MR. BLACKSHER: Yes, Your Honor.

MS. KHANNA: Yes, Your Honor. If I may just piggyback [31] off of something Mr. Ross said as everybody goes back to consider various options.

It's possible just in response to Judge Manasco's idea of thinking creatively here, how we can get these experts in a room, in the event that the Legislature is not able to act in the two weeks allotted, it is possible for the Court to proceed to appoint a special master well before that so that the structure is in place, but then at that point we can basically have a settlement conference among the parties. Not necessarily waiving whatever arguments people have on appeal on the liability point, but a settlement remedial conference where the lawyers and the map drawers are able to be in a room without relinquishing our experts, but being able to utilize our experts, and seeing if there is a joint

proposal that they're able to come up with for the Court's consideration and perhaps special master's consideration.

If there's not, we end up where we were otherwise, which is people presenting various competing maps. But that might be an option.

JUDGE MARCUS: What she's suggesting, Mr. Ross, Mr. Davis, Mr. Blacksher, Mr. Walker, is put them in a room with a special master; that is to say, either Cooper and Hinaman, or Duchin and Hinaman, or all three of them. We would have to think about that – with a special master and see what comes of that deliberation and that discussion.

[32] Do I have the thrust of that right, Ms. Khanna?

MS. KHANNA: Yes. Except I guess I guess I'm offering like a settlement conference. The attorneys would also be there – the special master may or may not be in the room, but it would really be a discussion among the parties. And I would say the three parties here to sit down and see if there is a joint resolution we can all agree on – “we” being the lawyers and the map drawers – that we can provide for the Court's approval, just like any settlement conference, where the lawyers would meet up and see if their clients could come to some agreement.

JUDGE MARCUS: Mr. Davis, what do you think about that?

MR. DAVIS: I'm not sure I understand Ms. Khanna's proposal. If she's discussing that we could actually try to resolve this claim, I don't think that's realistic, given our views of the governing law.

But I will think about it as to whether that structure might facilitate a remedial map in a way that would allow us to reserve all of our defenses.

JUDGE MARCUS: I understand.

Let's – Mr. Ross, anything else you wanted to say with regard to Ms. Khanna's observation?

MR. ROSS: No, Your Honor. Just that she's described sort of what we were thinking, as well. Thank you.

[33] JUDGE MARCUS: Let's do this, folks. I have 1:39. We will reconvene here at about 2:00 o'clock. And it will give you a chance to do some more thinking about it.

I understand, Mr. Davis, you have got to go back and speak to your clients and your principals, and I know Mr. Walker has to do that, as well, as do Mr. Ross, Ms. Khanna, and Mr. Blacksher.

We will take a break for about 20 minutes and then we will come back.

Thank you all.

(Recess.)

JUDGE MARCUS: Before we go forward any further, were there any additional comments or thoughts that anyone wanted to share with us?

Mr. Davis?

MR. DAVIS: Not from us, Judge. Thank you.

JUDGE MARCUS: Mr. Ross?

MR. ROSS: Your Honor, only thought is that since the Court – when the Court rules on the stay, we would just ask as soon as possible – and I know the Court is obviously working on it – that there be a written opinion, given that the defendants are intending to seek a stay in this.

Thank you, Your Honor.

JUDGE MARCUS: We will give you a written order on the stay probably no later than tomorrow.

[34] Ms. Khanna?

MS. KHANNA: Nothing further right now.

JUDGE MARCUS: Mr. Blacksher?

MR. BLACKSHER: Nothing further, Your Honor. Thank you.

JUDGE MARCUS: Mr. Davis, we have a question for you, my colleagues and I.

Ms. Khanna had raised the question or concern about privilege with regard to either Duchin or Cooper. If the Court decided to use Hinaman as our

cartographer – “our” being this three-judge court – would you have an objection to that?

MR. DAVIS: Judge, again, that’s something I would have to think about.

JUDGE MARCUS: I understand.

MR. DAVIS: Yeah. And that’s something I would have to discuss not just with my co-counsel, but with our principals, as well.

JUDGE MARCUS: I understand fully. But I would like you to think about it, and Ms. Khanna, and Mr. Ross, and Mr. Blacksher, we’d like you also to think about the possibility of the following scenario.

We retain the services of Mr. Hinaman; by that, I mean this three-judge court. Of course, we’re ahead of ourselves with all of this, because all of this assumes that the State’s legislative body is unable to perform this sovereign task of [35] drawing a map, and we have given you our view on the importance of that.

But assuming *arguendo* that it falls to us to do this, the scenario I’m throwing out to you is that we make Hinaman an arm of the Court. We are not interested in his past discussions with you, Mr. Davis, or any of your predecessors. But we hire him as the Court’s cartographer.

And subject to the supervision of a special master that we will pick, and pursuant to an express order that we will enter laying out exactly what the mission will be, what the considerations are that have to be

taken into account, and with the additional requirement that he must consult with Duchin and Cooper, or Cooper and Duchin, to the extent plaintiffs' counsel agree to allow that, and otherwise properly respect any privilege that may otherwise obtain. They may choose not to make Cooper and Duchin available at all.

But I am throwing out the scenario that we direct Mr. Hinaman, if we retain his services, to consult with him specifically in connection with this task pursuant to the orders we will enter and have entered, and pursuant to the supervision and involvement of a special master.

I want you to think about that. Does that work for you? Does that work for you, Ms. Khanna? Does that work for you, Mr. Ross? And enable you to ensure that you can protect any issue of privilege and it avoids the Court co-opting Duchin and [36] Cooper and making them an arm of the Court so they're not otherwise available to you.

I am thinking aloud. Maybe this is doable. Maybe it isn't. And maybe we will just pick a cartographer of our own choice and say thank you all very much, and move on from there.

But this strikes us as worth consideration. And it may be that there are ample ways to protect any privilege, Mr. Davis, that you may be concerned about, and any privilege, Mr. Ross, Ms. Khanna, and Mr. Blacksher, that you may be concerned about.

Does any of this make any sense to you? And I – by me asking the question, I don't mean that I need or expect an answer this minute. If you have any other thoughts, we're happy to hear them.

But what we are going to do is we're going to direct counsel for all of the parties – for the Secretary of State, for the intervening defendants, for the Caster people, for the Milligan people, and for the Singleton people – to sit down between now and Friday, discuss amongst yourselves whether there is a way to accomplish what it is we're suggesting. What's more, to come back by Friday 10:00 a.m. with a report telling us the following: First, any recommendations you may have for us to consider of a special master. We will pick a special master, and we will pick a special master pursuant not only to our authority under Rule 53 of the federal rules, but also pursuant to the inherent power of the Court, but we want [37] your guidance, your input, your help in that process.

So tell us whom you would suggest we consider for the task of being the special master; and, two, tell us what you think about the idea of Hinaman drawing the map with the requirement that he must sit down with Cooper and Duchin – we only frame it that way, Ms. Khanna, to answer the concern, which is a fair one that you raise, but to make sure that they have real input into this process under the supervision of a special master, and with you working out any problem about making sure that you keep inviolable the privilege of any conversations you may have had with any or all of them.

So we would ask you to let us know in a written report hopefully a joint report Friday 10:00 a.m. both on special master, cartographer, and the specific suggestion that has come out of our dialogue today.

And, finally, we will ask you to come on back 3:00 p.m. Central Standard Time on Friday, and we can take up the discussion at that point.

In addition, as I said, we will put out an order addressing the motion for a stay very shortly. And we will, Mr. Davis, also be putting out an order hopefully that makes it crystal clear that the order we entered referred to and only referred to the map that was drawn, with regard to the seven districts in the congressional elections – nothing more, nothing less. It has nothing to do with the issue the state [38] seeks, which is before another three-judge court, and which has been stayed with the concurrence of all of the counsel.

Any questions about anything I have said, Mr. Davis?

MR. DAVIS: No, Judge. Thank you. We understand what Your Honor's given us to consider.

JUDGE MARCUS: Ms. Khanna?

MS. KHANNA: No, Your Honor.

JUDGE MARCUS: Mr. Ross?

MR. ROSS: No, Your Honor. Thank you.

JUDGE MARCUS: All right. And Mr. Blacksher?

MR. BLACKSHER: I'm here. Yes, sir. Thank you.

JUDGE MARCUS: Thank you all very much for your participation and your help.

Was there something more you want to raise, Mr. LaCour or Mr. Davis?

MR. LACOUR: Would the Court be willing to consider issuing an oral – an oral order on our stay motion at this time, and then follow up with a written opinion –

JUDGE MARCUS: No.

MR. LACOUR: – when the Court has time do that?

JUDGE MARCUS: No. We're still ruminating. And we want the opportunity to fully consider and put it out in a written report. But you will not have to wait long. We will do everything we can to give you an answer promptly.

MR. LACOUR: All right. Thank you.

[39] JUDGE MARCUS: With that, I thank you for your request. I appreciate it.

We thank all of you. And we will see you back here 3:00 p.m. Central Standard Time on Friday. This Court is adjourned.

(Whereupon, the above proceedings were concluded at 2:18 p.m.)

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[40] CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Christina K. Decker
Christina K. Decker, RMR, CRR
Federal Official Court Reporter
ACCR#: 255

0-^ -2022
Date
